# Petriman, Viorica

**Subject:** FW: QUESTION- Your priorities today

**Attachments:** Greenidge Reactivation Supplemental Letter plus Siegelcomments.doc

From: Petriman, Viorica

Sent: Friday, September 12, 2014 6:12 PM

To: Siegel, Joseph

Subject: RE: QUESTION- Your priorities today

Hi Joe:

# Ex. 5: Attorney Client/Deliberative

Viorica

From: Siegel, Joseph

Sent: Friday, September 12, 2014 5:17 PM

To: Petriman, Viorica

Subject: RE: QUESTION- Your priorities today

Hi Viorica,

Have a great weekend!

# Petriman, Viorica

From: Petriman, Viorica

**Sent:** Friday, September 12, 2014 2:16 PM

**To:** Siegel, Joseph

**Subject:** Greenidge Draft Letter

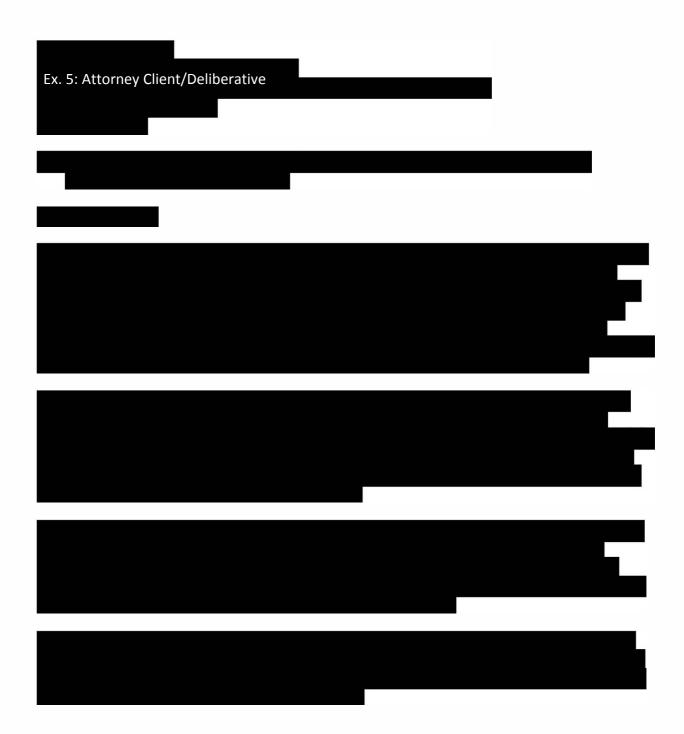
Attachments: Ex. C 2012 09 18 Notice of Retirement of Unit 4 filed in 05-E-0889.pdf; Ex. D Bankruptcy

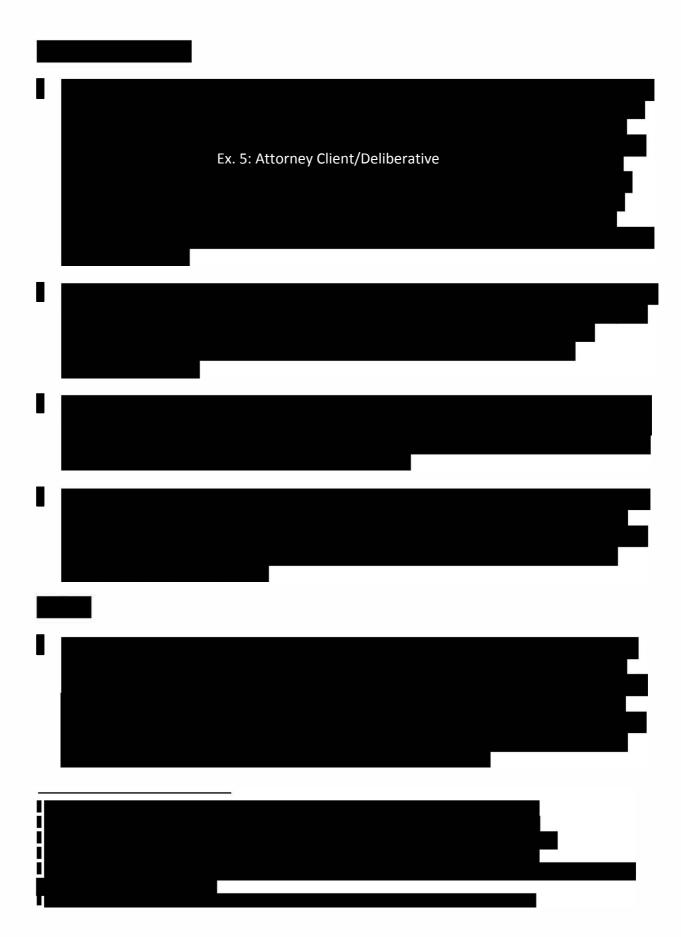
Motion to Approve APA.pdf; Ex. G Decl. Peter Norgeot Support Motion to Approve APA.pdf; Ex. H 11.28.2012 Letter Relinquishing Greenidge Air Permits.pdf; Ex. I Stipulation and Order to Terminate CD.pdf; Ex. L Pierce Email Transmitting Letter Requesting Rescind Permit Transportation.pdf; Ex. M GreenidgeLtrtoPierce01-30-2013 RE Recission of Permit Surrender.pdf; EPA-Greenidge Reactivation Supplemental

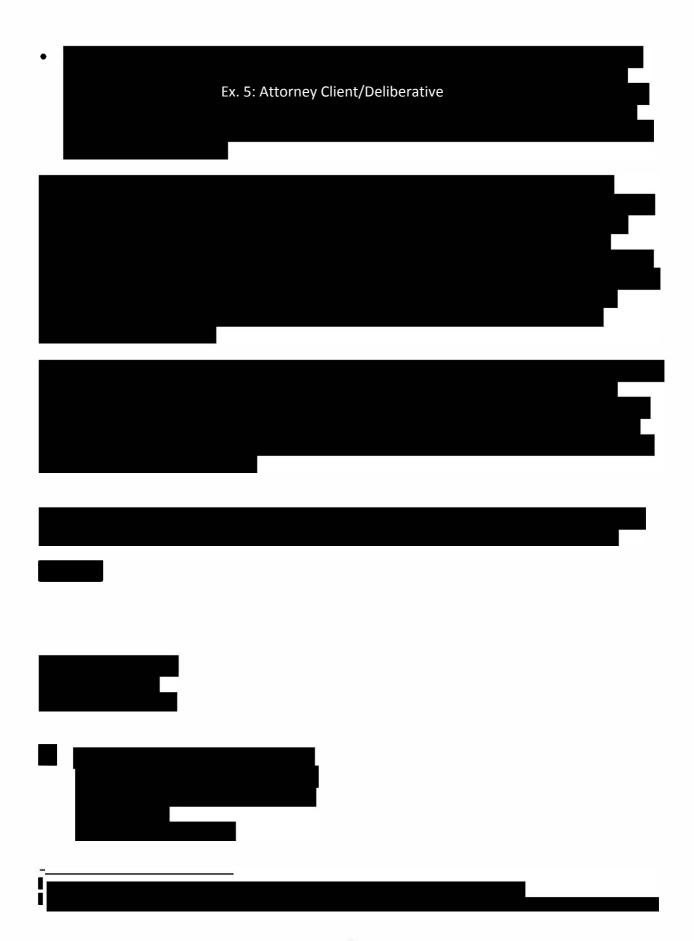
Letter.doc

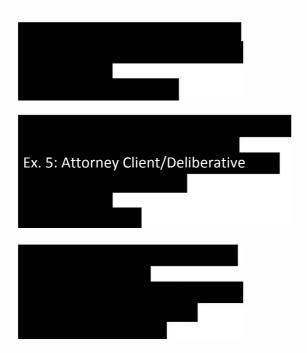
#### Joe:

I am attaching the Exhibits- in case you are interested to take a look. However, I do not plan to send them to DEC- they already have them.



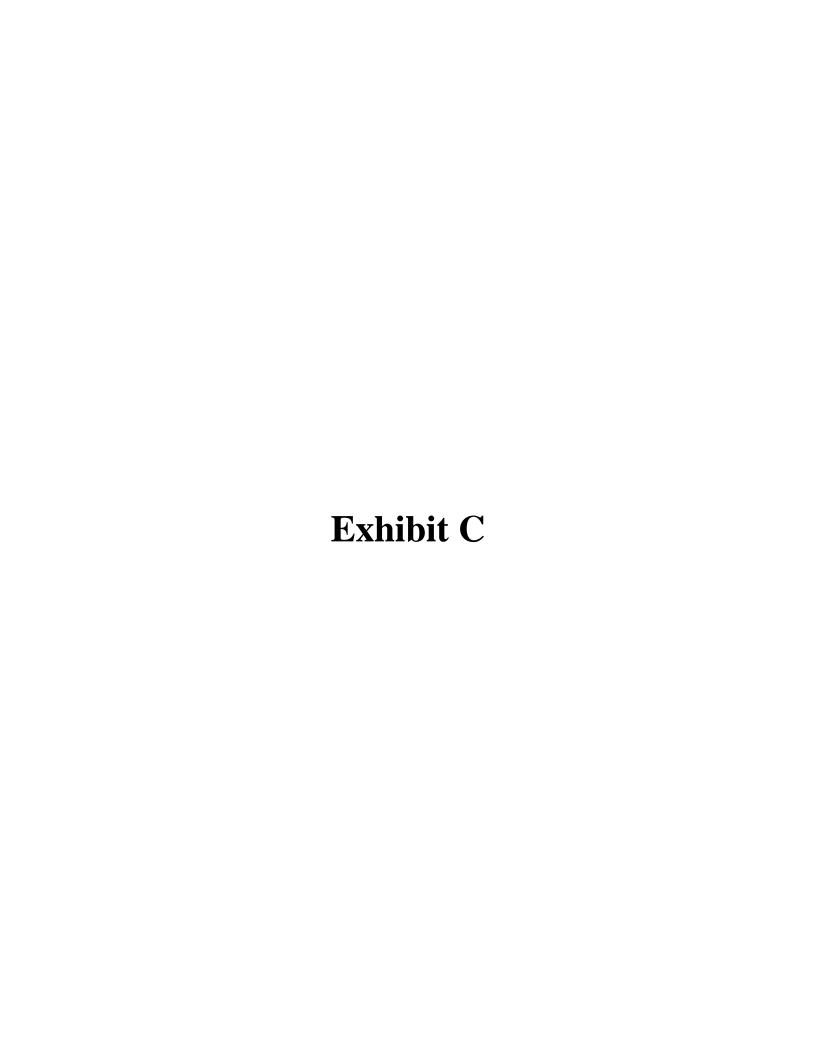








# Ex. 5: Attorney Client/Deliberative





AES AEE2, LLC Suite 505 130 East Seneca Street Ithaca, New York 14850 tel 607.272.5970 fax 607.272.5971

#### Via Electronic Mail

September 18, 2012

Hon. Jaclyn A. Brilling Secretary New York State Public Service Commission Three Empire State Plaza Albany, New York 12223

Re: Notice of Retirement of Greenidge Unit 4

Torrey, Yates County, New York

Dear Secretary Brilling:

AEE2, LLC ("AEE2"), a wholly owned subsidiary of AES Eastern Energy, L.P., is the owner of, and AES Greenidge, LLC, a wholly owned subsidiary of AEE2, LLC, is the operator of, the Greenidge Unit 4 generating facility located in the town of Torrey in Yates County, New York. On September 17, 2010, AEE2 served notice to the New York State Public Service Commission ("Commission"), the New York Independent System Operator, Inc. ("NYISO") and New York State Electric & Gas Corporation ("NYSEG"), pursuant to the Commission's Generator Retirement Notice Order, that AEE2 intended to place its Greenidge Unit 4 facility in protective lay-up on March 19, 2011.<sup>2</sup>

Pursuant to the Retirement Order, NYSEG, as the "affected T&D utility," and the NYISO analyzed whether the retirement of the Greenidge Unit 4 facility could harm the reliability of the bulk and local electric transmissions systems in New York. To AEE2's knowledge, no such reliability concerns were identified. The Greenidge Unit 4 facility has been in protective lay-up status since March 19, 2011 and has not operated since well before that date.

<sup>&</sup>lt;sup>1</sup> The Greenidge Unit 4 facility is a 108 MW coal and biomass-fired generating facility.

<sup>&</sup>lt;sup>2</sup> Case 05-E-0889, Proceeding on Motion of the Commission To Establish Policies and Procedures Regarding Generation Unit Retirements, Order Adopting Notice Requirements for Generation Unit Retirements (December 20, 2005) ("Retirement Order"). In its Order the Commission defined "retirement" to collectively included, *inter alia*, "mothballing, and other circumstances where a generating unit is taken out of service for a substantial period of time, excluding scheduled maintenance and forced outages."



AEE2 intends to permanently retire the Greenidge Unit 4 facility on September 21, 2012 and soon thereafter transfer the facility to a salvage company to dismantle and salvage the facility.

In accordance with Technical Bulletin No. 185 issued by the NYISO, AEE2 contemporaneously has sent a copy of this letter to the NYISO via e-mail directed to its designated address. AEE2 has also provided a copy of this letter to NYSEG.

Please contact me if you have any questions concerning this notice.

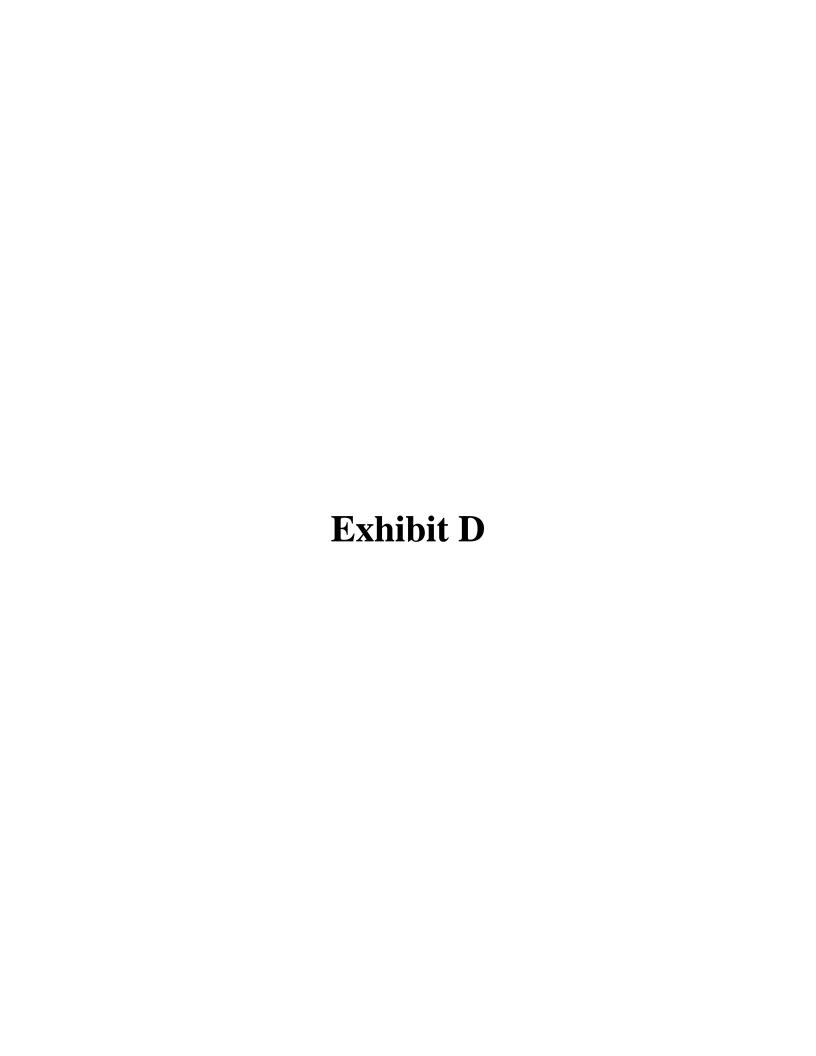
Sincerely,

William B. Rady

Director, AEE2, LLC

cc: New York Independent System Operator (via e-mail)

Mr. Jeffrey McKinney, New York State Electric and Gas (via e-mail)



# IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

-----X

: Chapter 11

In re:

Case No. 11-14138 (KJC)

AES EASTERN ENERGY, L.P., et al., 1

(Jointly Administered)

Debtors.

DEBTORS' MOTION PURSUANT TO SECTIONS
105(a), 363(b), (f), AND (m), AND 365 OF THE BANKRUPTCY
CODE, BANKRUPTCY RULES 2002, 6004, AND 6006, AND LOCAL
RULE 6004-1 (I) FOR AUTHORIZATION TO (A) SELL ASSETS FREE AND
CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES, AND OTHER INTERESTS
AND (B) ASSUME AND ASSIGN CONTRACTS AND LEASES TO PURCHASER
AND (II) FOR APPROVAL OF PROCEDURES FOR DETERMINING CURE AMOUNTS

AES Eastern Energy, L.P. ("AEE") and its above-captioned debtor affiliates, as debtors and debtors in possession (collectively, the "Debtors"), respectfully represent:

# **Preliminary Statement**<sup>2</sup>

1. In late December 2011, facing significant constraints on liquidity, the Debtors commenced these chapter 11 cases to effectuate the prompt divestiture of the Debtors' two operating coal-fired power plants located in Barker, New York and Lansing, New York (the "Operating Facilities") and the orderly wind down of the Debtors' remaining business assets, which include four non-operating coal-fired power plants. From the outset, the Debtors' goal for

<sup>&</sup>lt;sup>1</sup> The Debtors in these chapter 11 cases and the last four digits of each Debtor's taxpayer identification number are as follows: AES New York Surety, L.L.C. (8629); AES New York Holdings, L.L.C. (N/A); AES NY, L.L.C. (1039); AES NY2, L.L.C. (0091); AES NY3, L.L.C. (N/A); AES Creative Resources, L.P. (0087); AES Jennison, L.L.C. (N/A); AES Hickling, L.L.C. (N/A); AES Eastern Energy, L.P. (0088); AES Somerset, L.L.C. (3850); AES Cayuga, L.L.C. (3841); AEE2, L.L.C. (N/A); AES Greenidge, L.L.C. (3847); and AES Westover, L.L.C. (3851). The Debtors' principal offices are located at 130 East Seneca Street, Suite 505, Ithaca, New York 14850.

<sup>&</sup>lt;sup>2</sup> Capitalized terms used but not defined in this Preliminary Statement shall have the respective meanings ascribed to such terms below.

these chapter 11 cases has been to find a way to ensure that their assets could be promptly liquidated in a way that would responsibly provide for payment of, and compliance with, asset retirement and environmental closure obligations related to the Debtors' non-operating plants. The first step in that process was the sale of the Operating Facilities, which closed successfully on June 29, 2012, after extensive negotiations and approval by this Court. This Motion now addresses the Debtors' remaining assets and accomplishes the second major step of the liquidation of the Debtors' assets and the resolution of their liabilities.

- 2. This Motion seeks Court approval for the sale of the Debtors' four non-operating coal-fired power plants, certain related real and personal property (collectively, the "*Residual Assets*")<sup>3</sup>, and the assumption by a responsible buyer of the Debtors' long-term asset retirement and environmental closure obligations. The ability to dispose of the Residual Assets for a positive purchase price was unexpected at the outset of these cases and the proposed transaction represents a significant benefit for the Debtors' creditors.
- 3. The Non-Operating Facilities do not produce any electricity or generate any meaningful revenue for the Debtors, but the Debtors' estates must continue to bear the carrying costs of the Residual Assets, which include real property taxes, insurance premiums, environmental compliance expenses, and other costs, all amounting to nearly \$3 million per year. In addition to the ongoing carrying costs associated with the Residual Assets, the Debtors would also eventually be required to incur significant environmental closure and asset retirement costs associated with those assets. In an effort to divest themselves of the Residual Assets and associated liabilities, shortly after the Petition Date, the Debtors and their financial advisor,

<sup>&</sup>lt;sup>3</sup> The Residual Assets include the non-operating electric generating facilities located in Dresden, New York, Johnson City, New York, Bainbridge, New York, and Corning, New York (collectively, the "*Non-Operating Facilities*"), the Weber Ash Disposal Site located in Fenton, New York, the Lockwood Ash Disposal Site located in Dresden, New York, and certain ancillary related property.

Barclays Capital, Inc. ("Barclays"), began marketing the Residual Assets. The Debtors and Barclays contacted over fifty parties, executed confidentiality agreements with twenty-five potential purchasers and received seven indications of interest for the purchase of either some or all of the Residual Assets and the assumption of certain related liabilities. Most of these proposals entailed a negative purchase price – that is, the Debtors would have had to pay cash to induce the buyer to acquire the power plant assets and assume associated asset retirement and environmental closure obligations – and several did not include all the Residual Assets, which would have left the Debtors with continued costs and liabilities associated with the properties left behind. After conducting necessary diligence and engaging in extensive discussions with the various parties who submitted proposals, the Debtors eventually received a cash-positive bid from GMMM Holdings, Corporation (the "Purchaser") for substantially all of the Residual Assets. That proposal led to the transaction for which the Debtors now seek approval by this Motion.

4. The offer by the Purchaser was not the only cash-positive bid, however, the Debtors, working with their advisors, determined that the proposed transaction with the Purchaser represented the highest and best offer for the Residual Assets among all the indications of interest received over the many months of the marketing and sale process. The Purchaser, which intends to permanently retire the Non-Operating Facilities, salvage or scrap the equipment, and demolish the buildings so the sites eventually can be redeveloped, has extensive experience with power plant demolition, asbestos abatement, and other necessary skills. In addition, the Purchaser has presented the strongest evidence of financial ability to pay the purchase price and satisfy the assumed liabilities. Overall, of all the proposed buyers who offered a positive purchase price, the Purchaser presented the fewest execution risks and

appeared better equipped to proceed quickly with finalizing the terms of a purchase agreement for a sale of the Residual Assets (the "Sale").

- 5. After thorough deliberation and consultation with the Creditors'

  Committee, the Debtors determined in their business judgment that the proposal submitted by the Purchaser for the Sale of the Residual Assets and the assumption of all known and unknown environmental liabilities associated with the Residual Assets for an aggregate cash purchase price of \$2.25 million (the "*Purchase Price*") represented the best and highest offer attainable in light of the need to execute the Sale promptly. Accordingly, the Debtors and the Purchaser proceeded to negotiate, in good faith and at arm's length, the terms of the Sale, which terms are reflected in the form of Purchase Agreement annexed to the proposed Sale Order as *Exhibit 1*.
- 6. The Sale provides the Debtors with a second sale transaction that will set a clear path for resolution of these chapter 11 cases. The Sale to the Purchaser will prevent the continued accrual of administrative expenses associated with maintaining the Non-Operating Facilities and will also provide the Debtors additional funds to responsibly wind down their estates and provide a greater recovery to their creditors. Because the Sale maximizes the value of the Residual Assets and minimizes the exposure of the Debtors' estates to ongoing administrative expenses associated with maintaining the Residual Assets, including asset retirement and environmental closure obligations, the transaction is in the best interests of the Debtors, their estates, and creditors.
- 7. Accordingly, the Debtors request that the Court approve the Sale of the Residual Assets to the Purchaser in accordance with the terms of the Purchase Agreement substantially in the form attached to the proposed Sale Order, free and clear of all liens, claims,

encumbrances, and other interests (except those interests specifically identified in the Purchase Agreement), pursuant to section 363 of the Bankruptcy Code.

#### **Background**

- 8. On December 30, 2011 (the "Petition Date"), each of the Debtors commenced a voluntary case under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"). The Debtors are authorized to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.
- 9. The Debtors' chapter 11 cases have been consolidated for procedural purposes only and are being jointly administered pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the "*Bankruptcy Rules*") and Rule 1015-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "*Local Rules*").
- 10. On January 12, 2012, the United States Trustee for the District of Delaware (the "*U.S. Trustee*") appointed the statutory committee of unsecured creditors pursuant to section 1102 of the Bankruptcy Code (the "*Creditors' Committee*").

#### The Debtors' Businesses

11. Additional information about the Debtors' businesses, capital structure, and the circumstances leading to the commencement of these chapter 11 cases can be found in the *Declaration of Peter Norgeot in Support of the Debtors' Chapter 11 Petitions and Request for First Day Relief*, filed on the Petition Date (D.I. 11).

# **The Sale of the Operating Facilities**

- 12. Shortly after the Petition Date, certain of the Debtors and the holders of certain pass-through certificates issued by the owner-lessors of the Operating Facilities (the "Certificate Holders"), Deutsche Bank Trust Company Americas, as indenture trustees, the Creditors' Committee, the holders of beneficial interests in certain owner trusts, the agent for the prepetition lenders of AES New York Surety, L.L.C., and other major creditor constituencies in these chapter 11 cases reached a fully consensual and global settlement for the disposition of the Debtors' Operating Facilities and the resolution of various disputes regarding the characterization of the related leveraged leases (the "Settlement Agreement").
- 13. On March 5, 2012, the Court entered the *Order Pursuant to Sections 363* and 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019 Approving a Compromise and Settlement (D.I. 269) approving the Settlement Agreement. Pursuant to the Settlement Agreement, the Certificate Holders' designated purchaser, Somerset Cayuga Holding Company, Inc. ("Newco"), served as the stalking horse bidder in the sale of the Operating Facilities.
- 14. On April 11, 2012, the Court entered the *Order Authorizing Entry of an Order Approving (A) Sale of Assets Free and Clear of All Liens, Claims, Encumbrances, and Other Interests, and (B) Assumption and Assignment of Executory Contracts to Successful Bidder(s) (D.I. 420), approving the Debtors' sale of the Operating Facilities to Newco pursuant to an Asset Purchase and Sale Agreement executed on April 11, 2012. The sale of the Operating Facilities was consummated on June 29, 2012.*

#### Marketing Process for Sale of Residual Assets and Proposed Transaction

15. The Debtors have selected the Purchaser and arrived at the terms of the Purchase Agreement following a seven-month marketing and negotiation process during which the Debtors and their advisors attempted to obtain the highest and otherwise best offer for the

Residual Assets. In light of the Debtors' potential exposure to asset retirement and environmental closure costs associated with the Residual Assets, the Debtors sought to enter into a transaction that would provide for both the disposition of all Residual Assets and any potential purchaser's assumption of known and unknown environmental liabilities related to those assets. Despite the inherent costs of pursuing a piecemeal sale process, the Debtors nonetheless solicited proposals for any combination of assets or liabilities to ensure that no viable proposals would be foreclosed. Concerned about the risk of a potential purchaser's failure to proceed to a closing or its subsequent insolvency or default on any assumed environmental obligations after closing, the Debtors, however, placed significant emphasis on selecting one purchaser that presented the fewest execution risks.

- 16. The Debtors and their advisors actively marketed the Residual Assets and solicited interest from a wide range of potential acquirers. Due to a number of factors, however, including the current status and condition of the Non-Operating Facilities, the presence of related known and unknown asset retirement and environmental closure costs, and the depressed economic environment of the electric power industry, particularly for coal-fired power plants, the Debtors received only a small number of legitimate indications of interest.
- 17. Throughout the month of January 2012, the Debtors' advisors contacted a total of thirty-five parties and sought further information regarding those parties' potential interest in purchasing some or all of the Residual Assets. Over the following months, the Debtors' advisors were in contact with sixteen additional parties regarding a possible transaction. The contacted entities varied in nature and included, among others, companies specializing in demolition, environmental remediation, and salvage.

- 18. The Debtors subsequently entered into confidentiality agreements with twenty-five potential purchasers and provided those purchasers with access to comprehensive financial, environmental, and other information through an online dataroom. The Debtors also facilitated a total of ten site visits during the seven-month period following the Petition Date.
- 19. In late March, the Debtors sent a letter to all potential bidders requesting the submission of proposals by no later than 5:00 p.m. on April 16, 2012 and setting forth certain instructions and guidelines for the submission of such proposals. On or before the proposal deadline, the Debtors received proposals from five potential purchasers, including the Purchaser, a joint venture, and three other independent entities.
- 20. In late April, the Debtors engaged in follow up discussions with certain parties and, subsequently, received revised proposals from three of the interested parties, including the Purchaser. In mid-May, the Debtors also received new proposals from two additional parties.
- 21. The proposals submitted to the Debtors varied substantially in the scope of the proposed assets to be purchased and liabilities to be assumed, the scope of due diligence required, the financial capacity and execution risks associated with each potential purchaser, the proposed aggregate consideration and cash component, and the proposed purchasers' respective closing timelines.
- 22. Of the seven proposals received by the Debtors, only four of the proposals, including the Purchaser's proposal, contemplated both the transfer of substantially all the Residual Assets as well as the assumption of all related known and unknown environmental liabilities. One such proposal required the Debtors to pay in excess of \$19 million to the potential purchaser on account of the potential liabilities associated with the Residual Assets and

another did not include any cash component and presented significant financing contingencies. A third proposal was competitive with the Purchaser's bid in terms of cash consideration and the overall package of assumed assets and liabilities, but it included significant financing contingencies and diligence requirements and, overall, much greater execution risks for the Debtors. Moreover, the Purchaser expressed an immediate willingness to negotiate the terms of the Purchase Agreement and forego additional due diligence and site visits in the interest of quickly proceeding to closing the Sale. Accordingly, the Purchaser appeared better able to accommodate the Debtors' desire to quickly divest themselves of the Residual Assets and associated liabilities and proceed with the subsequent wind-down of the Debtors' estates on an expedited basis. After consulting extensively with their advisors and reengaging with the Purchaser to increase the proposed purchase price, the Debtors, in their reasonable business judgment, concluded that the Purchaser's proposal, as modified, constituted the highest and otherwise best offer for the Residual Assets.

23. The Debtors have taken steps to ensure that the proposed Sale will not be subject to unnecessary regulatory approval delays. Specifically, the Debtors have engaged with the New York State Department of Environmental Conservation (the "DEC") to discuss the proposed Sale and the Purchaser and to identify any potential obstacles to satisfying various conditions to closing, including permit transfers. On August 15, 2012, the Debtors and the Purchaser met with the DEC to discuss the Purchaser's plans for addressing environmental matters at the Non-Operating Facilities, the specific environmental regulatory approvals that would be required, and various aspects of the transaction as they relate to environmental matters. After a constructive and candid dialog, the DEC indicated that it was generally supportive of the Sale, subject to review of the final terms of the deal and any necessary permit transfer

applications when submitted. The positive and cooperative responses from the DEC gave the Debtors further assurance that a transaction with the Purchaser had a high chance of closing promptly and successfully.

- 24. AES Greenidge, L.L.C., AES Westover, L.L.C., AES Jennison, L.L.C., AES Hickling, L.L.C., AES Creative Resources, L.P., and AEE2, L.L.C. (collectively, the "Selling Debtors"), AEE, and the Purchaser have, accordingly, negotiated and agreed to enter into the Purchase Agreement substantially in the form annexed to the proposed Sale Order as Exhibit 1 (the "Purchase Agreement").
- 25. In light of the foregoing and the Debtors' extensive marketing efforts to date, the Debtors and the Creditors' Committee believe that no further marketing efforts are necessary and that the costs of engaging in any further marketing of the Residual Assets would outweigh any benefit that might be derived from such marketing.

## **Timing of the Sale**

26. The Debtors shortly will propose a chapter 11 plan (the "*Plan*"). The Plan will be premised upon the consummation of the Sale. By this Motion, the Debtors seek a hearing to consider the relief requested herein at the omnibus hearing on October 10, 2012 at 1:00 p.m. and, following entry of the Sale Order (when and if entered), the Debtors hope to close the Sale to the Purchaser as quickly as possible. Because the Debtors contemplate that the Sale will be a central aspect of the Plan, the Debtors seek authority to incorporate the terms of the proposed Sale Order (when and if entered) into any order confirming the Plan.

#### Jurisdiction

27. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

#### **Relief Requested**

- Bankruptcy Code, Bankruptcy Rules 2002, 6004, and 6006, and Local Rule 6004-1, the Debtors seek entry of an order, to be deemed effective immediately upon entry by waiving the fourteenday stay under Bankruptcy Rules 6004(h) and 6006(d), substantially in the form annexed hereto as **Exhibit A** (the "Sale Order"): (i) approving certain procedures (the "Assumption Procedures") for the assumption and assignment of executory contracts and unexpired leases (collectively, the "Contracts") to the Purchaser and the determination of the amount of cure obligations (the "Cure Amounts"), if any, related thereto and (ii) authorizing (a) the Sale of the Residual Assets to the Purchaser free and clear of all liens, claims, encumbrances, and other interests in accordance with the terms of the Purchase Agreement and (b) the Debtors to assume and assign certain Contracts to the Purchaser in accordance with the Assumption Procedures set forth herein.
- 29. The Debtors further request authority, but not direction, to consummate the Sale pursuant to the terms of a Plan and to have the terms of any order granting the relief requested herein incorporated into any order confirming such Plan.

#### Sale of the Residual Assets

#### A. Salient Terms of the Purchase Agreement Pursuant to Local Rule 6004-1<sup>4</sup>

- 30. As described in more detail above, the Debtors have engaged in extensive, arm's length negotiations with the Purchaser regarding the terms of the transfer of the Residual Assets. In accordance with Local Rule 6004-1, certain terms of the Purchase Agreement are detailed below:
  - a. Assets. The Residual Assets are set forth in the Purchase Agreement and include, among other things, certain owned and leased real property, materials, inventory, and spare parts located at the Non-Operating Facilities, environmentally-related deposits related to the Non-Operating Facilities as of the Closing Date, Furniture and Equipment, Purchased Contracts, Documents, Permits, supplies, vehicles, rolling stock, and machinery owned by the Debtors and located at or used primarily in connection with the Non-Operating Facilities. The Residual Assets are described generally in Section 2.1 of the Purchase Agreement. The real property to be transferred under the Purchase Agreement is specifically described in Section 5.6 of the Purchase Agreement. All leases of personal property are described in Section 5.7 of the Purchase Agreement. All material contracts of any Selling Debtor related to the Residual Assets are described in Section 5.8 of the Purchase Agreement.
  - b. <u>Consideration</u>. The Purchaser's offer for the Residual Assets provides for a Purchase Price, as set forth in Section 3.1 of the Purchase Agreement, equal to (a) cash in an amount equal to \$2,250,000, (b) the assumption by the Purchaser of those liabilities set forth in Section 2.3 of the Purchase Agreement (the "Assumed Liabilities"), including, without limitation, all known and unknown environmental liabilities relating to conditions present at the Residual Assets, and (c) such other consideration as is set forth in the Purchase Agreement. See Purchase Agreement §§ 2.3, 3.1.
  - c. <u>No Sale to an Insider</u>. The Purchaser is not an insider of any of the Selling Debtors within the meaning set forth in section 101(31) of the Bankruptcy Code.

<sup>&</sup>lt;sup>4</sup> Capitalized terms used but not otherwise defined in this section shall have the meanings ascribed to such terms in the Purchase Agreement. To the extent that any defined terms used herein are inconsistent with the Purchase Agreement, the terms of the Purchase Agreement shall control.

- d. <u>Agreements with Management</u>. No agreements with management or key employees will be entered into in connection with the Sale of the Residual Assets.
- e. Releases. No releases have been entered into in connection with the Sale.
- f. Private Sale/No Competitive Bidding. As set forth herein in greater detail, the Debtors have solicited competing proposals over the past seven months and submit that the terms memorialized in the Purchase Agreement constitute the highest and otherwise best offer for the Residual Assets. The Debtors do not believe that further marketing or conducting an auction with respect to such assets would procure a higher or better offer. Further, the Creditors' Committee has approved of the Debtors' disposition of the Residual Assets through a private sale to the Purchaser. Accordingly, the Debtors intend to sell the Residual Assets without conducting an auction.
- g. Purchaser Protections. Section 7.2 of the Purchase Agreement provides that, in the event that the Court approves a sale or other disposition of all or a material portion of the Residual Assets to a party other than the Purchaser or one of its affiliates within one year of the date of execution of the Purchase Agreement, the Selling Debtors shall pay the Purchaser (a) a break-up fee in the amount of \$150,000 and (b) the amount of the reasonable and documented expenses incurred by the Purchaser in connection with the Sale transactions up to an aggregate amount of \$50,000 (collectively, the "Purchaser Protections"). The Purchaser Protections are to be paid on the first business day after the Court's entry of an Order approving the sale of the Residual Assets to any entity other than the Purchaser. See Purchase Agreement § 7.2.
- h. <u>Closing and Other Deadlines</u>. Section 4.1 of the Purchase Agreement provides that closing of the Sale (the "*Closing*") shall occur at 10:00 a.m. (Eastern Time) on the date that is four (4) business days following the satisfaction or waiver of the conditions set forth in Article IX of the Purchase Agreement, unless another time or date, or both, are agreed to in writing by the parties to the Purchase Agreement (the "*Closing Date*"). The Purchase Agreement further provides that the Closing may be consummated in connection with and pursuant to any order confirming a chapter 11 plan. The obligation of the Purchaser to close the Sale is subject to the satisfaction of certain customary closing conditions, including conditions related to regulatory and Court approvals. *See* Purchase Agreement §§ 4.1, 9.1, and 9.2.
- i. <u>Good Faith Deposit</u>. Upon the execution of the Purchase Agreement, the Purchaser will immediately deposit \$750,000 into an escrow account maintained with Citibank N.A., which deposit will be forfeited by the

- Purchaser if the Purchase Agreement is terminated by the Debtors pursuant to Section 4.4(f) of the Purchase Agreement. *See* Purchase Agreement § 3.2.
- j. <u>Interim Arrangements with Proposed Buyer</u>. The Purchase Agreement requires the Debtors to continue to conduct their business in the ordinary course until the Closing Date and provides that the Selling Debtors shall not remove any Furniture and Equipment from any of the Owned Properties. *See* Purchase Agreement § 8.2.
- k. <u>Use of Proceeds</u>. Section 11.3 of the Purchase Agreement provides that the Purchase Price shall be allocated as specified in Schedule 11.3 to the Purchase Agreement.
- 1. Tax Exemption. No provision of the Purchase Agreement addresses the use of tax exemptions. Paragraph 31 of the Sale Order provides that the Purchaser shall not have any liability whatsoever with respect to, or be required to satisfy in any manner, whether at law or equity, or by payment, setoff, or otherwise, directly or indirectly, any liens, claims, encumbrances, or other interests relating to any U.S. federal, state and local tax liabilities that the Debtors incur in connection with the Sale of the Residual Assets, except as provided for in the Purchase Agreement. See Sale Order ¶ 31.
- m. Record Retention. The Purchase Agreement provides that the Selling Debtors and the Purchaser agree that each of them shall preserve and keep the records held by them relating to the Selling Debtors' pre-closing business for a period of three (3) years from the Closing Date and shall make such records available to the other parties as may be reasonably required by such party. In the event that any of the Selling Debtors or the Purchaser wishes to destroy records before or after that time, such party must give ninety (90) days' prior notice to the other party and such other party shall have the right at its option and expense, to take possession of the records within one hundred and eighty (180) days after the date of such notice. See Purchase Agreement § 8.7.
- n. <u>Sale of Avoidance Actions</u>. The Purchase Agreement does not provide for the sale by the Selling Debtors of any rights or claims under chapter 5 of the Bankruptcy Code.
- o. <u>Requested Findings as to Successor Liability</u>. The Purchaser is undertaking only those Assumed Liabilities set forth in Section 2.3 of the Purchase Agreement. In paragraph R of the proposed Sale Order, the Debtors seek a finding that the Purchaser shall not be deemed to (i) be the successor to any of the Selling Debtors, (ii) have *de facto* or otherwise,

- merged with or into any of the Selling Debtors, or (iii) be a continuation or substantial continuation of any of the Selling Debtors.
- p. <u>Sale Free and Clear</u>. The Purchase Agreement and Sale Order provide that the Purchaser shall acquire good title in, to and under all of the Residual Assets, in each case free and clear of all liens, claims, encumbrances, and other interests of any kind (other than Assumed Liabilities and Permitted Exceptions), to the fullest extent permissible under Section 363(f) of the Bankruptcy Code. *See* Purchase Agreement § 5.4; Sale Order ¶ 8.
- q. <u>Credit Bid</u>. The Purchase Price does not include consideration in the form of a credit bid.
- r. <u>Relief from Bankruptcy Rule 6004(h)</u>. As set forth below in greater detail, the Debtors seek a waiver of the fourteen-day stay imposed by Bankruptcy Rule 6004(h).

#### B. Sale of the Residual Assets is Appropriate

- 31. Ample authority exists for the approval of the proposed Sale pursuant to sections 363(b)(1) and 105(a) of the Bankruptcy Code. Section 363(b)(1) of the Bankruptcy Code provides, in pertinent part, that the "trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Section 105(a) of the Bankruptcy Code, which confers broad powers on bankruptcy courts, provides that the "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a).
- 32. The decision to use and sell property of the estate outside the ordinary course of business is entrusted to the sound business judgment of the debtor. *See*, *e.g.*, *Myers v*. *Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (citing *Fulton State Bank v*. *Schipper (In re Schipper)*, 933 F.2d 513, 515 (7th Cir. 1991)); *Comm. of Equity Sec. Holders v*. *Lionel Corp.* (*In re Lionel Corp.*), 722 F.2d 1063, 1071 (2d Cir. 1983) (holding that to obtain court approval to sell property under section 363(b), a debtor must show a "sound business reason" for the proposed action); *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999)

(affirming decision permitting debtor to sell assets where sound business reasons supported the sale); *In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991) (same).

- (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct." *In re Johns-Manville Corp.*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986). If a valid business justification exists, there is a strong presumption that a debtor acted "in good faith and in the honest belief that the action taken was in the best interests of the company." *In re Integrated Res., Inc.*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)), *appeal dismissed*, 3 F.3d 49 (2d Cir. 1993). The burden of rebutting this presumption falls to parties opposing the proposed exercise of a debtor's business judgment. *Id.* (citing *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)). A section 363 sale should be approved if the Court is satisfied that the debtor has (a) exercised its sound business judgment; (b) the debtor has provided adequate notice; (c) the purchaser has proceeded in good faith; and (d) the purchase price is fair. *See In re Del. & Hudson Ry. Co.*, 124 B.R. at 176. The Sale satisfies each condition.
- 34. The Debtors' decision to sell the Residual Assets is based upon the exercise of their sound business judgment. The Debtors believe that the Sale of the Residual Assets pursuant to the Purchase Agreement is in the best interest of the Debtors and their creditors because it provides for \$2.25 million in cash consideration, the purchase of all the Residual Assets, assumption of all known and unknown environmental liabilities related to those assets, and the fewest execution risks of any of the proposals received by the Debtors.
- 35. As discussed above, prior to the Petition Date, the Debtors worked diligently with their advisors to explore alternatives to a sale of the Operating Facilities and

Residual Assets. The sale of those assets was made difficult outside the context of chapter 11 by the Debtors' complicated leveraged lease structure. Following the Petition Date, the Debtors actively marketed the Residual Assets separately from the Operating Facilities and sought to locate a purchaser willing to purchase all of the Residual Assets and also assume all known and unknown environmental liabilities related thereto. Although the Debtors received a total of seven proposals, the bulk of those proposals contemplated only a piecemeal purchase of the Residual Assets, did not provide for the assumption of both known and unknown environmental liabilities, and/or, in some cases, presented significant execution risks that threatened to impede the closing of any sale and/or the viability of the bidder's demolition and remediation efforts. Of the two proposals that provided for the sale of all the Residual Assets, assumption of related environmental liabilities (both known and unknown), and payment of cash consideration, the Debtors determined that only the Purchaser would be able to proceed with the consummation of the Sale on an expedited timeline and ensure the continued administration of the Residual Assets and the resolution of liabilities related thereto following the Sale. The Debtors' primary goal is to promptly close on the Sale so they can complete their liquidation and conclude these chapter 11 cases. The Purchaser's proposal presented the highest likelihood of successfully closing due to the relative strength of the Purchaser's balance sheet compared to other potential acquirers and its experience with power plant demolition, asbestos abatement, and other technical skills necessary to manage the Residual Assets post-Closing. The positive reaction of the DEC to the transaction provided the Debtors with further assurance that the Sale would not be subject to regulatory obstacles.

36. The Debtors have marketed the Residual Assets, evaluated bidder proposals, and negotiated with the Purchaser and other potential purchasers in good faith. The

Purchase Agreement and terms of the Sale have been heavily negotiated at arm's length over the course of several months and the Debtors strongly believe that the Purchase Agreement represents the highest and otherwise best offer for the Residual Assets.

37. Based on the foregoing, the Debtors submit that the proposed Sale is in the best interest of the Debtors' estates and the Debtors' creditors because the sale will enable the Debtors to transfer the Residual Assets in exchange for substantial consideration (including \$2,250,000 in cash), halt the accrual of administrative expenses related to the upkeep and maintenance of the Residual Assets, divest the Debtors' estates of ongoing environmental remediation costs, and permit the Debtors to proceed with the formulation and confirmation of a Plan that provides for the orderly wind down and distribution of the Debtors' remaining assets to their creditors.

#### C. The Purchaser Protections Should be Approved

- 38. The Purchase Agreement provides for certain Purchaser Protections to compensate the Purchaser in the event that the Residual Assets are sold to another person or entity. Although the Debtors propose to sell the Residual Assets to the Purchaser via a private sale, the Purchaser required the Purchaser Protections to ensure that, in the event that the Court required an auction or other competitive bidding process, the Purchaser would be compensated for the time and resources previously expended negotiating the terms of the Purchase Agreement.
- 39. The use of purchaser protections is an established practice in chapter 11 asset sales involving the sale of significant assets such as the Residual Assets. Such terms enable a debtor to ensure a sale to a contractually committed bidder at a price the debtor believes is fair, while also protecting the bidder in the event that a higher or otherwise better offer is subsequently selected.

- 40. The Third Circuit has established standards for determining the appropriateness of bidding incentives in the bankruptcy context. In *Calpine Corporation v*. *O'Brien Environmental Energy, Inc.* (*In re O'Brien Environmental Energy, Inc.*), 181 F.3d 527 (3d Cir. 1999), the Third Circuit Court of Appeals held that, while bidding incentives are measured against a business judgment standard in non-bankruptcy transactions, the administrative expense provisions in section 503(b) of the Bankruptcy Code govern in the bankruptcy context. To be approved, bidding incentives such as the Purchaser Protections must provide a benefit to the debtor's estate and be necessary to preserve the value of estate assets. *Id.* at 533.
- Debtors' estates identified in *O'Brien*, they should be approved. As previously discussed, after extensive marketing efforts, the Purchaser was the only entity that presented an offer that included a competitive cash-positive offer for the Residual Assets, assumption of all known and unknown environmental liabilities and, significantly, the absence of execution risks and financing contingencies. Absent the Purchaser Protections, however, the Purchaser would have been unwilling to proceed with the expenditure of time and resources required to negotiate the terms of the Purchase Agreement. Indeed, the Purchaser Protections served as an inducement, encouraging the Purchaser to negotiate an agreement it otherwise would not have, to do so on an expedited basis, and to invest its resources in valuing the Residual Assets. In the event that the Residual Assets are sold to the Purchaser, the Purchaser Protections will not be paid to the Purchaser and, accordingly, will be of no detriment to the estate. In the event that the Court requires the Purchase Agreement to be made subject to higher or otherwise better offers through a competitive bidding process, the Purchaser Protections will provide a significant value to the

estate by setting a floor bid and ensuring that the Debtors will receive no less than the value provided under the Purchase Agreement. Moreover, the Debtors will not select another offer unless it presents the Debtors with, at a minimum, the equivalent of the sum of the cash consideration provided under the Purchase Agreement and the Purchaser Protections and, accordingly, the value received by the Debtors for the Residual Assets will not be diminished as a consequence of the Purchaser Protections.

42. For the foregoing reasons, the Debtors submit that the proposed Purchaser Protections provide an actual benefit to the Debtors' estates and, accordingly, the Purchaser Protections should be approved.

#### D. Sale Free and Clear of Liens, Claims and Encumbrances is Appropriate

- 43. The Debtors further submit that it is appropriate that the Residual Assets be sold free and clear of all liens, claims, encumbrances, and other interests pursuant to section 363(f) of the Bankruptcy Code. Pursuant to section 363(f) of the Bankruptcy Code, a debtor may sell property under Bankruptcy Code section 363(b) free and clear of any liens, claims, encumbrances, and other interests of an entity other than the estate if one of the following conditions is satisfied:
  - (1) applicable nonbankruptcy law permits the sale of such property free and clear of such interest;
  - (2) such entity consents;
  - (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
  - (4) such interest is in bona fide dispute; or
  - (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f). Because section 363(f) is stated in the disjunctive, when selling property of the estate, it is only necessary to meet one of the five conditions listed in that section. *See Folger Adam Sec. Inc. v. De Matteis/MacGregor*, *JV*, 209 F.3d 252, 257 (3d Cir. 2000) (noting that a debtor is authorized to sell property free and clear of "any interest" if any one of the five prescribed conditions under section 363(f) is met); *In re Kellstrom Indus.*, *Inc.*, 282 B.R. 787, 793 (Bankr. D. Del. 2002) ("Section 363(f) is written in the disjunctive, not the conjunctive, and if any of the five conditions are met, the debtor has the authority to conduct the sale free and clear of all liens.") (citing *Citicorp Homeowners Servs.*, *Inc. v. Elliot (In re Elliot)*, 94 B.R. 343, 345 (E.D. Pa. 1988)); *In re DVI*, *Inc.*, 306 B.R. 496, 504 (Bankr. D. Del. 2004) (approving sale free and clear of interests where debtors met only the conditions of 363(f)(4)).

- 44. To facilitate the Sale and the resultant transfer of corresponding liabilities related to the Residual Assets for the benefit of all creditors, it is necessary to authorize the sale of the Residual Assets free and clear of any and all liens, claims, encumbrances, or other interests, including rights or claims based on any successor or transferee liability, other than the Assumed Liabilities assumed by the Purchaser, with any such liens, claims, encumbrances, or other interests to transfer to and attach to the net proceeds of the Sale with the same rights and priorities therein.
- 45. The Sale of the Residual Assets will satisfy section 363(f) of the Bankruptcy Code because any known entities holding liens, claims, encumbrances, or other interests on the Residual Assets will have received notice of this Motion. All known parties in interest will be given sufficient opportunity to object to the relief requested in this Motion, and any such entity that does not object to the Sale should be deemed to have consented. *See Futuresource LLC v. Reuters Ltd.*, 312 F.3d 281, 285-86 (7th Cir. 2002) ("It is true that the

Bankruptcy Code limits the conditions under which an interest can be extinguished by a bankruptcy sale, but one of those conditions is the consent of the interest holder, and lack of objection (provided of course there is notice) counts as consent. It could not be otherwise; transaction costs would be prohibitive if everyone who *might* have an interest in the bankrupt's assets had to execute a formal consent before they could be sold.") (internal citations omitted) (emphasis in original); *Hargrave v. Twp. of Pemberton (In re Tabone, Inc.)*, 175 B.R. 855, 858 (Bankr. D.N.J. 1994) (failure to object to sale free and clear of liens, claims and encumbrances satisfies section 363(f)(2)); *In re Elliot*, 94 B.R. at 345 (same). As such, to the extent that no party holding liens, claims, encumbrances, or other interests objects to the relief requested in the Sale Order, the sale of the Residual Assets free and clear of all liens, claims, encumbrances, or other interests, except the Assumed Liabilities and Permitted Exceptions, satisfies section 363(f)(2) of the Bankruptcy Code.

46. Accordingly, the Debtors request that the Residual Assets be transferred to the Purchaser, free and clear of all liens, claims, encumbrances, and other interests except for Assumed Liabilities, with such liens, claims, encumbrances, and other interests to attach to the net sale proceeds of the Residual Assets.

#### E. Auction of the Residual Assets is Not Required

47. Bankruptcy Rule 6004(f)(1) permits private sales or sales conducted without an auction. Fed. R. Bankr. P. 6004(f)(1) ("All sales not in the ordinary course of business may be by private sale or by public auction."). Further, courts have generally held that a debtor has broad discretion in determining the manner in which assets are sold. *Berg v. Scanlon (In re Alisa P'ship)*, 15 B.R. 802, 802 (Bankr. D. Del. 1981) ("[T]he manner of sale is within the discretion of the trustee . . . ."); *In re Bakalis*, 220 B.R. 525, 531 (Bankr. E.D.N.Y.

1998) (noting that a trustee has "ample discretion to administer the estate, including authority to conduct public or private sales of estate property.") (citing *In re WPRV-TV, Inc.*, 143 B.R. 315, 319 (D.P.R. 1991)). As long as a debtor maximizes the return to its estate, a court should defer to a debtor's business judgment regarding how to structure an asset sale. *Bakalis*, 220 B.R. at 532 (recognizing that although a trustee's business judgment enjoys great judicial deference, a duty is imposed on the trustee to maximize the value obtained from a sale); *In re NEPSCO, Inc.*, 36 B.R. 25, 26 (Bankr. D. Me. 1983) ("Clearly, the thrust of th[e] statutory scheme [governing 363 sales] is to provide maximum flexibility to the trustee, subject to the oversight of those for whose benefit he acts, *i.e.*, the creditors of the estate."). Accordingly, if the Debtors conclude that conducting a private sale, as opposed to a public auction, is in the best interests of their estates, the Debtors should be permitted to do so. *See Penn Mut. Life Ins. Co. v. Woodscape Ltd. P'ship*), 134 B.R. 165, 174 (Bankr. D. Md. 1991) (noting that, with respect to sales of estate property, "[t]here is no prohibition against a private sale . . . and there is no requirement that the sale be by public auction.").

48. The Debtors' decision to pursue a sale without an auction is supported by the fact that the Debtors have fully explored potential sales of all or some of the Residual Assets with a wide range of interested parties. The time, effort, and expense associated with marketing the Residual Assets for sale at a public auction would needlessly duplicate the previous efforts expended by the Debtors and their advisors and would likely exceed the value of any marginal increase in purchase price or any other benefits provided. Accordingly, the Debtors' decision to sell the Residual Assets to the Purchaser pursuant to the Purchase Agreement is supported by the Debtors' business judgment and should be approved.

# F. Purchaser Entitled to Good Faith Protections

49. The Purchaser is purchasing the Residual Assets in good faith and is entitled to the full protection of section 363(m) of the Bankruptcy Code. Section 363(m) of the Bankruptcy Code protects a good-faith purchaser's interest in property purchased from the debtor, notwithstanding that the sale conducted under section 363(b) is later reversed or modified on appeal. Specifically, section 363(m) of the Bankruptcy Code states that:

The reversal or modification on appeal of an authorization under [section 363(b) of the Bankruptcy Code] of a sale . . . of property does not affect the validity of a sale . . . to an entity that purchased . . . such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale . . . were stayed pending appeal.

11 U.S.C. § 363(m).

- 50. Section 363(m) fosters the "'policy of not only affording finality to the judgment of the bankruptcy court, but . . . give[s] finality to those orders and judgments upon which third parties rely." *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 147 (3d Cir. 1986) (quoting *Hoese Corp. v. Vetter Corp.* (*In re Vetter Corp.*), 724 F.2d 52, 55 (7th Cir. 1983)); *see Allstate Ins. Co. v. Hughes*, 174 B.R. 884, 888 (S.D.N.Y. 1994) ("Section 363(m) . . . provides that good faith transfers of property will not be affected by the reversal or modification on appeal of an unstayed order, whether or not the transferee knew of the pendency of the appeal."); *In re Stein & Day, Inc.*, 113 B.R. 157, 162 (Bankr. S.D.N.Y. 1990) ("pursuant to 11 U.S.C. §363(m), good faith purchasers are protected from the reversal of a sale on appeal unless there is a stay pending appeal").
- 51. The Debtors request a finding that the Purchaser is a good faith purchaser entitled to the protections of section 363(m). The terms and conditions of the Purchase Agreement have been negotiated by the Debtors and the Purchaser at arm's length and in good

faith. The Purchaser was represented by qualified counsel and the Debtors believe that the Purchaser has not engaged in any conduct that would indicate or constitute a lack of good faith. See In re Gucci, 126 F.3d 380, 392 (2d Cir. 1997) ("Good faith of a purchaser is shown by the integrity of his conduct during the course of sale proceedings . . . ."); In re Tempo Tech. Corp., 202 B.R. 363, 367 (D. Del. 1996) (stating that a purchaser's good faith status would be destroyed only by conduct involving "fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.") (quoting In re Rock Indus. Mach. Corp., 572 F.2d 1195, 1198 (7th Cir. 1978)). Accordingly, the Debtors believe that the Purchaser is entitled to the protections that section 363(m) of the Bankruptcy Code provides to a good faith purchaser.

#### **Assumption of Contracts**

52. In order to facilitate the Debtors' assumption and assignment of certain Contracts to the Purchaser in an expeditious fashion, while simultaneously ensuring to all Contract counterparties adequate notice and an opportunity to object, the Debtors propose to establish certain Assumption Procedures for assuming and assigning prepetition Contracts to the Purchaser pursuant to section 365 of the Bankruptcy Code. The Assumption Procedures are reasonably calculated to provide all counterparties to the Contracts with proper notice of the potential assumption and assignment of the Contracts, Cure Amounts, if any, and the deadline to object to Cure Amounts.

#### A. <u>Determination of Assumable Contracts</u>

53. On or before the date that is not less than fourteen (14) days prior to the hearing to consider the relief requested in this Motion (the "Sale Hearing"), the Debtors shall file a notice of assumption (the "Initial Assumption Notice") with the Court and serve such notice via first class mail on each counterparty to a Contract listed thereon. The Initial

Assumption Notice will list all Contracts of the Debtors related to the Residual Assets that the Debtors and the Purchaser believe may be assumed and assigned in connection with the Sale (the "Designated Contracts"). The Initial Assumption Notice will also include a good faith estimate of the Cure Amount applicable to each such Designated Contract (and if no Cure Amount is estimated to be applicable with respect to any particular Designated Contract, the Cure Amount for such Designated Contract is listed as \$0.00).

- Contracts to, or remove Contracts from, the list of Designated Contracts at any time on or before October 23, 2012 (the "Designation Deadline"). See Purchase Agreement § 1.1. On or before the Designation Deadline, the Purchaser shall provide to the Debtors a list of those Contracts that it either elects to designate to have assigned to it on the Closing Date or elects to remove from the list of Designated Contracts. Accordingly, the Debtors reserve the right to (a) supplement the list of Designated Contracts and to provide additional notices of assumption (each such notice being referred to hereafter as a "Supplemental Assumption Notice" and together, with the Initial Assumption Notice, the "Assumption Notices"), and (b) remove Contracts from the list of Designated Contracts and provide written notice to a Contract counterparty in the event that the counterparty's Contract is no longer identified as a Designated Contract.
- 55. For the avoidance of doubt, only those Contracts that remain identified as Designated Contracts as of the Closing Date (collectively, the "Assigned Contracts") will be assumed by the applicable Debtor and assigned to the Purchaser.

#### B. <u>Contract Assumption Objection Procedures</u>

56. Any objections to the assumption and/or assignment of any Contract identified as a Designated Contract, including to the Cure Amount set forth on the applicable

Assumption Notice, must be in writing, filed with the Court, and actually received by the relevant notice parties set forth in the applicable Assumption Notice no later than ten (10) days after the date on which the Debtors file and mail the Initial Assumption Notice or Supplemental Assumption Notice, as applicable (together, the "Assumption and Cure Objection Deadlines").

- Objection Deadline, then the proposed assumption and assignment is authorized and the Cure Amounts set forth in the applicable Assumption Notice shall be binding upon the contract counterparty for all purposes and will constitute a final determination of the total Cure Amount required to be paid to the counterparty in connection with the assumption and assignment to the Purchaser. In addition, any counterparty to a Designated Contract that does not file an objection prior to the applicable Assumption and Cure Objection Deadline shall be forever barred from objecting to the Debtors' proposed assumption and assignment to the Purchaser and the Cure Amount set forth in the applicable Assumption Notice, including, without limitation, the right to assert any additional cure or other amounts with respect to the Contract arising or relating to any period prior to such assumption or assignment.
- 58. If a timely objection is received and such objection cannot otherwise be resolved by the parties, the Court may hear such objection at the next scheduled omnibus hearing date following the Assumption and Cure Objection Deadline, or any later date set by the Court (an "Assumption Hearing"). The pendency of a dispute relating to Cure Amounts will not prevent or delay the assumption and assignment of any Contracts.

#### C. <u>Assumption and Assignment of Executory</u> <u>Contracts and Unexpired Leases is Appropriate</u>

59. Section 365(a) of the Bankruptcy Code provides that a debtor in possession, "subject to the court's approval, may assume or reject any executory contract or

unexpired lease of the debtor." 11 U.S.C. § 365(a). Upon finding that debtors have exercised their sound business judgment in determining to assume an executory contract or unexpired lease, courts will approve the assumption under section 365(a) of the Bankruptcy Code. *See Nostas Assocs. v. Costich (In re Klein Sleep Prods., Inc.)*, 78 F.3d 18, 25 (2d Cir. 1996); *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1099 (2d Cir. 1993).

60. Section 365(b)(1) of the Bankruptcy Code requires that a debtor in possession meet certain additional requirements to assume a lease:

If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

- (A) cures, or provides adequate assurance that the trustee will promptly cure, such default . . . ;
- (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
- (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1). These requirements do not, however, apply to a default that is a breach of a provision relating to any of the following events:

- (A) the insolvency or financial condition of the debtor at any time before the closing of the case;
- (B) the commencement of a case under [the Bankruptcy Code];
- (C) the appointment of or taking possession by a trustee in a case under [the Bankruptcy Code] or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

*Id* § 365(b)(2).

- 61. Accordingly, section 365(b)(1) of the Bankruptcy Code requires that the Debtors cure, or provide adequate assurance that they will promptly cure, any outstanding defaults under the Assigned Contracts.
- 62. Pursuant to section 365(f)(2) of the Bankruptcy Code, a debtor in possession may assign an executory contract or lease if:
  - (A) the trustee assumes such contract or lease in accordance with the provisions of [section 365 of the Bankruptcy Code]; and
  - (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

*Id.* § 365(f)(2).

63. The meaning of "adequate assurance of future performance" depends on the facts and circumstances of each case, but should be given "practical, pragmatic construction." *See Carlisle Homes, Inc. v. Arrari (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr. D.N.J. 1989); *see also In re Natco Indus., Inc.*, 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985) (adequate assurance of future performance does not mean absolute assurance that debtor will thrive and pay rent). Among other things, adequate assurance may be given by demonstrating the assignee's financial health and experience in managing the type of enterprise or property assigned. *See In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (adequate assurance of future performance is present when prospective assignee of lease has financial resources and expressed

willingness to devote sufficient funding to business to give it strong likelihood of succeeding; chief determinant of adequate assurance is whether rent will be paid).

64. At the Assumption Hearing, to the extent necessary, the Debtors will be prepared to proffer testimony or present evidence to demonstrate the ability of the Purchaser to perform under the Assigned Contracts. The Assumption Hearing, therefore, will provide the Court and other interested parties with the opportunity to evaluate the ability of the Purchaser to provide adequate assurance of future performance under the Assigned Contracts, as required by section 365(b)(1)(C) of the Bankruptcy Code.

#### Request for Relief Under Bankruptcy Rules 6004(h) and 6006(d)

- 65. Bankruptcy Rule 6004(h) provides that an "order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 6004(h). Bankruptcy Rule 6006(d) similarly provides that an order authorizing the assignment of an executory contract or unexpired lease under section 365(f) is stayed until the expiration of fourteen days after entry of the order, unless the court orders otherwise. Fed. R. Bankr. P. 6006(d).
- Assets be effective immediately upon entry of such order by providing that the fourteen-day stay shall not apply. Absent the immediate effectiveness of the Sale Order, the Debtors may be hindered from completing applications for certain environmental permits and approvals that constitute necessary preconditions to Closing, thereby unnecessarily delaying such Closing. Accordingly, it is essential that the Sale Order be effective without any delay by providing that the fourteen-day stay under Bankruptcy Rules 6004(h) and 6006(d) be waived.

#### **Notice**

67. No trustee or examiner has been appointed in these chapter 11 cases. Notice of this Motion shall be given to: (i) the U.S. Trustee; (ii) Kramer, Levin, Naftalis & Frankel LLP (Attn: Gregory A. Horowitz, Esq. and Robert T. Schmidt, Esq.), counsel to the Creditors' Committee; (iii) Ashby & Geddes, P.A. (Attn: William T. Bowden, Esq., Benjamin W. Keenan, Esq., and Karen B. Owens, Esq.), co-counsel to the Creditors' Committee; (iv) Sitaras & Associates, P.C. (Attn: George Sitaras, Esq.), counsel to the Purchaser; (v) the Securities and Exchange Commission; (vi) the United States Attorney's Office for the District of Delaware; (vii) the Internal Revenue Service; (viii) all federal, state, and local regulatory or taxing authorities or recording offices which have a known interest in the relief requested; (ix) all entities known to have expressed an interest in acquiring any of the Residual Assets; (x) all entities (for whom identifying information and addresses are available to the Debtors) known to have an interest in the Residual Assets; (xi) all known parties (for whom identifying information and addresses are available to the Debtors) holding or asserting liens or encumbrances on the Residual Assets; and (xii) all parties who have requested notice in these chapter 11 cases pursuant to Bankruptcy Rule 2002. The Debtors respectfully submit that no further notice of this Motion is required.

#### **No Previous Request**

68. No previous request for the relief sought herein has been made by the Debtors to this or any other court.

WHEREFORE the Debtors respectfully request that the Court grant the relief requested herein and such other and further relief as it deems just and proper.

Dated: September 19, 2012 Wilmington, Delaware

\_/s/ Drew G. Sloan\_

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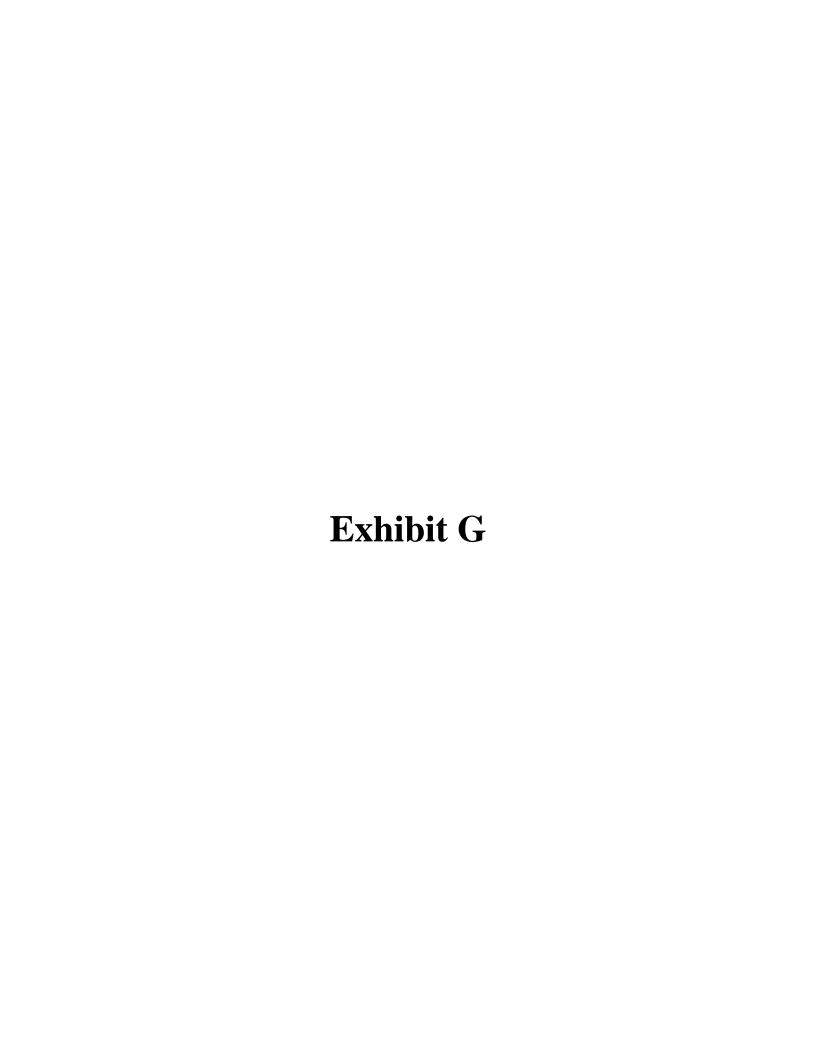
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Attorneys for Debtors and Debtors in Possession



# IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

: Chapter 11

In re:

: Case No. 11–14138 (KJC)

AES EASTERN ENERGY, L.P., et al.,<sup>1</sup> :

: (Jointly Administered)

Debtors.

: Re: D.I. 708

-----X Hearing Date: October 10, 2012 at 1:00 p.m.

DECLARATION OF PETER NORGEOT IN SUPPORT
OF DEBTORS' MOTION PURSUANT TO SECTIONS
105(a), 363(b), (f), AND (m), AND 365 OF THE BANKRUPTCY
CODE, BANKRUPTCY RULES 2002, 6004, AND 6006, AND LOCAL
RULE 6004-1 (I) FOR AUTHORIZATION TO (A) SELL ASSETS FREE AND
CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES, AND OTHER INTERESTS
AND (B) ASSUME AND ASSIGN CONTRACTS AND LEASES TO PURCHASER
AND (II) FOR APPROVAL OF PROCEDURES FOR DETERMINING CURE AMOUNTS

- I, Peter Norgeot, hereby declare, pursuant to section 1746 of title 28 of the United States Code, as follows:
- 1. I am the President of AES NY, L.L.C. ("AES NY"), the general partner of AES Eastern Energy, L.P. ("AEE" and, collectively with the other above-captioned debtors, the "Debtors"). I have served in this role since 2006. I am also currently a Director at each of the other Debtor entities. Previously, I acted as Group Manager for AES NY from April 2006 to May 2006; President and Plant Manager of AES Shady Point, L.L.C. from September 2004 until April 2006; a member of the AES Corporate Performance Group from 2003 to September 2004, and President and Plant Manager of AES Ironwood, L.L.C. from 1999 to 2003. I am familiar

<sup>&</sup>lt;sup>1</sup> The Debtors in these chapter 11 cases and the last four digits of each Debtor's taxpayer identification number are as follows: AES New York Surety, L.L.C. (8629); AES New York Holdings, L.L.C. (N/A); AES NY, L.L.C. (1039); AES NY2, L.L.C. (0091); AES NY3, L.L.C. (N/A); AES Creative Resources, L.P. (0087); AES Jennison, L.L.C. (N/A); AES Hickling, L.L.C. (N/A); AES Eastern Energy, L.P. (0088); AES Somerset, L.L.C. (3850); AES Cayuga, L.L.C. (3841); AEE2, L.L.C. (N/A); AES Greenidge, L.L.C. (3847); and AES Westover, L.L.C. (3851). The Debtors' principal offices are located at 130 East Seneca Street, Suite 505, Ithaca, New York 14850.

with the Debtors' day-to-day operations, books and records, and businesses and financial affairs.

I am responsible for supervising the Debtors' other employees and their professionals in connection with the disposition of their remaining assets and resolution of their liabilities.

- 2. I submit this declaration (the "*Declaration*") in support of the *Debtors*' *Motion Pursuant to Sections 105(a), 363(b), (f), and (m), and 365 of the Bankruptcy Code,*Bankruptcy Rules 2002, 6004, and 6006, and Local Rule 6004-1 (I) for Authorization to (A) Sell Assets Free and Clear of all Liens, Claims, Encumbrances, and Other Interests and (B) Assume and Assign Contracts and Leases to Purchaser and (II) For Approval of Procedures for Determining Cure Amounts, dated September 19, 2012 (D.I. 708) (the "*Motion*").
- 3. All facts set forth in this Declaration are based on my personal knowledge, my discussions with other members of the Debtors' senior management and financial advisors, my review of relevant documents, or my experience, knowledge and information concerning the Debtors' operations and financial affairs. If called to testify, I would testify competently to the facts set forth in this Declaration.
- 4. The proposed sale transaction (the "Sale") of the Residual Assets (defined herein), as set forth in the Motion and the form of Purchase Agreement annexed as Exhibit "1" to the form of proposed order attached to the Motion (the "Purchase Agreement"), is in the best interests of the Debtors, their estates, and their creditors. The Purchase Agreement was negotiated by and among the Debtors and the Purchaser (as defined herein), in consultation with the committee of unsecured creditors (the "Committee"). The Sale was negotiated in good faith and at arm's length. It provides meaningful and immediate benefits to the estates through the assumption by the Purchaser of ongoing responsibilities for payment of taxes, maintenance expenses and other operating costs. It provides for the assumption of significant asset retirement

and environmental closure liabilities for the Residual Assets. And it provides for payment to the Debtors of \$2.25 million in cash that will be distributed to creditors pursuant to a plan of liquidation. After an extensive marketing process, and taking into consideration the price, execution risk, and overall benefits to the estate of all proposals received, the Debtors have concluded in the exercise of their business judgment that the proposed Sale represents the best offer for the Residual Assets and the overall consideration to the estates is fair and reasonable.

#### **The Residual Assets**

5. As discussed in my previous declaration in support of the Debtors' chapter 11 petitions and requests for first day relief (D.I. 11), the Debtors acquired six coal-fired electricity generating power plants located in the western and west-central part of New York State, together with certain related assets, pursuant to an asset purchase agreement between AES NY and the New York State Electric & Gas Corporation ("NYSEG") and its affiliate, NGE Generation, Inc. Among the power plants acquired were the Greenidge Generating Facility in Dresden, New York (the "Greenidge Facility"), the Westover Generating Facility in Johnson City, New York (the "Westover Facility"), the Hickling Generating Facility in Corning, New York (the "Hickling Facility"), and the Jennison Generating Facility in Bainbridge, New York (the "Jennison Facility," and together with the Greenidge, Westover, and Hickling Facilities, the "Non-Operating Facilities"). The Jennison and Hickling Facilities were retired in 2002 and have not operated since. In March 2011, after providing six-months prior notice to the New York Public Service Commission, the Debtors placed the Westover and Greenidge Facilities into long-term protective lay-up status as part of their efforts to improve operating margins and cash flows.

- 6. After an extended marketing process, both before and after the commencement of the chapter 11 cases, the Debtors received no credible proposals for acquisition of the Greenidge or Westover Facilities as operating power plants. Accordingly, the Debtors concluded that the highest and best value obtainable for the Non-Operating Facilities would be a transaction to sell them for salvage, scrap and redevelopment value.
- 7. The primary goal of the Debtors from the outset of these chapter 11 cases was to divest the Non-Operating Facilities in a way that ensured performance of asset retirement and environmental closure obligations notwithstanding the Debtors' limited cash. The proposed transaction to sell the Non-Operating Facilities and certain related real and personal property (the "*Residual Assets*")<sup>2</sup> to GMMM Holdings, LLC (the "*Purchaser*") pursuant to the Purchase Agreement achieves this goal.

#### The Purchase Agreement Was Negotiated In Good Faith

- 8. After actively marketing the Residual Assets for a period of approximately six months and evaluating numerous proposals, the Debtors, with the assistance of their financial and legal advisors, and in consultation with the Committee, entered into good-faith, arms' length negotiations with the Purchaser to arrive at the terms of the form of Purchase Agreement filed with the Court on September 19, 2012.
- 9. During several months of negotiations, the Debtors and their professionals negotiated to achieve the best terms possible for the Debtors and to ensure, to the greatest extent possible, that the contemplated Sale would be consummated in a timely manner. The negotiations were robust and were conducted at all times in good faith, and the Purchaser was represented by its own independent counsel throughout. The Debtors were able to substantially

<sup>&</sup>lt;sup>2</sup> The Residual Assets include the Non-Operating Facilities, the Weber Ash Disposal Site located in Fenton, New York, the Lockwood Ash Disposal Site located in Dresden, New York, and certain ancillary related property.

improve the terms of the transaction through negotiations, including increases in the scope of assumed liabilities and an increase in the cash purchase price. Neither the Purchaser nor its affiliates is an insider or affiliate of the Debtors. I am not aware of any circumstances suggesting any collusion with other bidders or any other improper conduct by the Purchaser.

# The Transaction Is Reasonable And In the Best Interests of the Debtors' Estates

- Debtors and their estates. The primary benefit to the estates is the assumption by the Purchaser of all asset retirement and environmental liabilities related to the Residual Assets. Although the ultimate cost of these activities could be determined only after investigation and negotiation with the New York State Department of Environmental Conservation (the "DEC") over the required scope of work and any applicable cleanup standards, the cost to the Debtors of completing this work would be substantial and would significantly reduce, and possibly completely eliminate, all creditor recoveries in these cases. This is demonstrated by the DEC's own filing in this Court, which outlined various requirements the DEC believes would have to be met. See Declaration of Certain Other Interests of the New York State Department of Environmental Conservation in the AES Facilities and Operations (D.I. 591).
- ongoing administrative expenses for taxes, insurance, maintenance, security, utilities, environmental compliance, and other operating expenses. The Purchaser also will assume obligations under the Debtors' settlement with NYSEG to provide various services necessary for the continued operation of NYSEG's transmission and distribution systems at the Non-Operating Plants during a transition period.

12. In addition to the assumption of these liabilities, the Sale will provide \$2.25 million in cash consideration to the Debtors—a significant achievement in light of competing proposals which would have required payment of as much as \$19 million by the Debtors. Indeed, at the outset of these chapter 11 cases the Debtors were not optimistic they would receive any positive cash consideration for the Residual Assets.

#### The Debtors Concluded the Sale Is Superior to Other Proposed Transactions

- The Debtors and their financial advisors, Barclays Capital, Inc., conducted an extensive marketing effort to identify parties who might be interested in acquiring the Residual Assets. These efforts resulted in several proposals described more fully in the Declaration of Firdaus Pohowalla. In evaluating all of the proposals, the Debtors chose the one that presented the most favorable combination of several key factors, including: (a) scope of assumed liabilities; (b) technical and financial ability of the purchaser to satisfy the assumed liabilities and perform the required asset retirement and environmental closure obligations; (c) execution risk; and (d) purchase price. Execution risk includes the ability to promptly close the transaction without extensive environmental diligence or other delays, as well as the purchaser's ability to demonstrate to relevant stakeholders, such as the DEC and NYSEG, that it is capable of performing all assumed liabilities.
- 14. On August 15, 2012, the Debtors and the Purchaser met with the DEC to discuss, among other things, the identity of the Purchaser, the Purchaser's plans for addressing environmental matters at the Non-Operating Facilities, and the specific environmental regulatory approvals that would be required. The DEC indicated that it was generally supportive of the Sale of the Residual Assets to the Purchaser, subject to review of the final terms of the deal and any applicable permit transfer applications when submitted. The Debtors and the Purchaser also

have consulted with NYSEG, and the Purchaser has provided NYSEG with information demonstrating its ability to perform.

- 15. The positive reaction of the DEC to the Purchaser's proposal, and the constructive dialog between the Purchaser and NYSEG, provided the Debtors with further assurance that the Sale would not be subject to regulatory obstacles and likely would not be delayed by disputes with NYSEG before this Court or before energy regulators.
- proposal to acquire the Residual Assets from a bidder (the "Second Bidder") that had previously submitted a bid for the Residual Assets. This bid is described more fully in the Declaration of Firdaus Pohowalla. The Debtors reviewed the Second Bidder's revised proposal and determined that it was not superior to the existing transaction with the Purchaser. Although the Second Bidder offered approximately \$500,000 additional cash consideration after payment to the Purchaser of a breakup fee and expense reimbursement, the Debtors concluded there were several other factors that made the Second Bidder's proposal inferior. These included lack of assurance that the Second Bidder would be able to satisfy the assumed liabilities as well as increased execution risk. In light of the very small increase in creditor recoveries that might result from an incremental increase in the cash purchase price, the Debtors determined that it was not in the best interests of their estates to start over with a riskier, new bidder. Thus, after consultation with the Debtors' advisors and advisors to the Committee, the Debtors concluded that the Purchaser's offer remains superior.

#### The Sale Procedures and Purchaser Protections Are Appropriate

17. The Debtors fully explored all potential sales of all or some of the Residual Assets with a wide range of interested parties. Based on the results of the marketing

process, the Debtors, after consulting with the Committee, determined that an auction was not likely to result in any material improvement to the terms of the Sale agreed with the Purchaser. The time, effort, and expense associated with further marketing the Residual Assets or conducting a public auction would unnecessarily duplicate the previous efforts of the Debtors and their advisors, and likely would exceed the value of any marginal increase in purchase price that might be obtained in an auction. Accordingly, the Debtors concluded that a private sale was in the best interests of their estates.

- required the inclusion of certain purchaser protections in the Purchase Agreement (the "Purchaser Protections") to compensate the Purchaser in the event the Residual Assets are sold to another person or entity. The Purchaser required the Purchaser Protections to ensure that, in the event the Court requires an auction or other competitive bidding process, or the Debtors otherwise elect to sell the Residual Assets to another bidder, the Purchaser would be compensated for the time and resources expended negotiating the terms of the Purchase Agreement. The Purchaser Protections thus served as an inducement by encouraging the Purchaser to invest its resources in evaluating the assets and assumed liabilities and reaching agreement on a form of purchase agreement. The Purchaser Protections are appropriate because without those protections, the Purchaser would have been unwilling to enter into the Purchase Agreement.
- 19. The Purchaser Protections are limited in scope and amount. The Purchaser will receive a maximum breakup fee of \$150,000 plus a maximum of \$50,000 in expense reimbursement. These amounts are small in comparison to the total value of the transaction to the Debtors, which includes not just the \$2.25 million purchase price but, far more

importantly, the assumption of unquantified asset retirement and environmental closure obligations that likely will be many times greater than the purchase price.

20. The Purchaser Protections would be paid only in the circumstance that this Court declines to approve a private sale and requires an auction with the Purchaser as a stalking horse bidder, and even then only if a topping bid is accepted. The Debtors would require that any topping bid exceed the Purchaser's price by an increment in addition to the amount of the Purchaser Protections, and the Purchaser Protections would be paid only on closing of the transaction. Accordingly, the Purchaser Protections will have no adverse effect on the estates and their creditors.

#### The Proposed Sale Is a Sound Exercise of the Debtors' Business Judgment

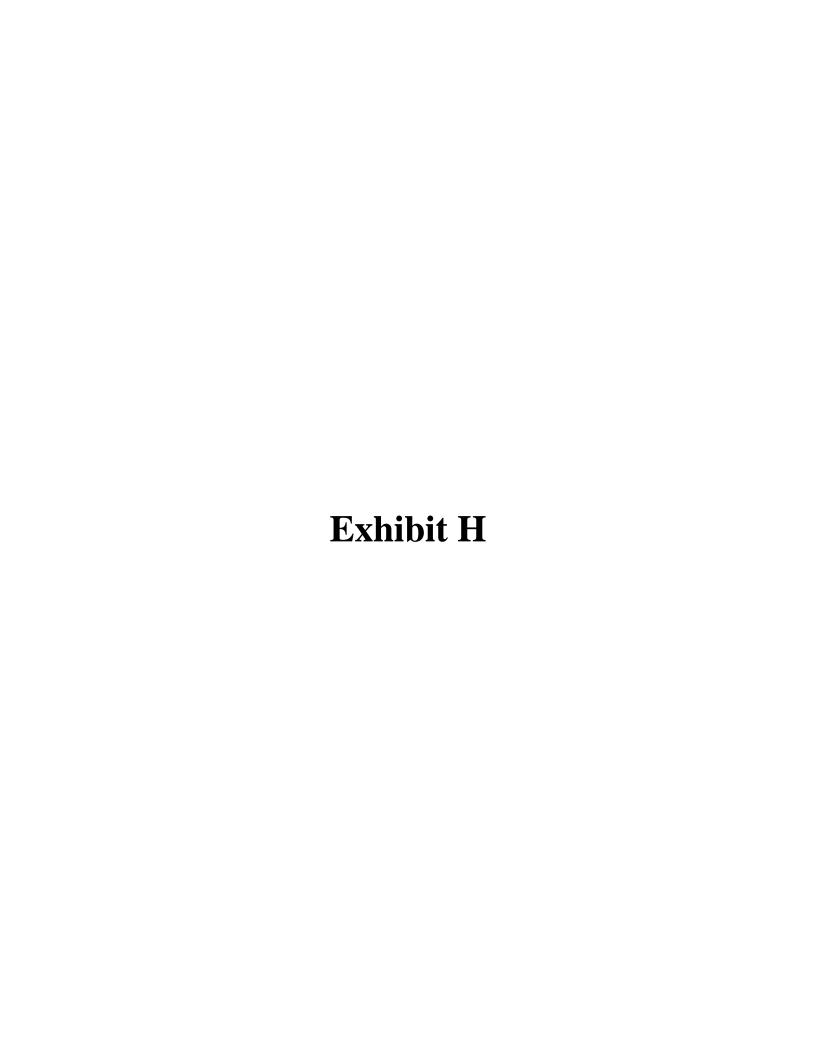
Debtors' and Purchaser's good faith negotiations, the necessity of transferring the Residual Assets in an expedient manner, and the Debtors' extensive marketing efforts, the Sale is fair, equitable, and in the best interests of all of the Debtors, their estates, and their creditors. The Debtors have not entered into the Purchase Agreement for the purpose of, nor does it have the effect of, hindering, delaying, or defrauding creditors of any of the Debtors. I reached this conclusion after conducting my own review of the issues and in consultation with the other officers and directors of related Debtor entities and our financial and legal advisors. It is my judgment, and the judgment of the Debtors' other senior managers, that the proposed Sale is the best transaction available to the Debtors for the disposition of the Residual Assets.

Case 11-14138-KJC Doc 748 Filed 10/05/12 Page 10 of 10

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 4, 2012 at Ithaca, New York.

Peter Norgeot





130 East Seneca St. Suite 505 Ithaca, NY 14850

November 28, 2012

Scott Sheeley
New York Department of Environmental Conservation
Division of Environmental Permits, Region 8
6274 East Avon Lima Road
Avon, NY 14414-9519

Re:

AES Greenidge LLC

Title V Permit ID 8-5736-0004/00013 Title IV Permit ID 8-5736-00004/00014 DEP REGION 8

Dear Mr. Sheeley,

AES Greenidge LLC hereby notifies the New York Department of Environmental Conservation ("DEC") that it is relinquishing its above-referenced permits, which are enclosed herewith.

As you may know, the Greenidge station is not currently operating. On December 30, 2011, the AES Greenidge LLC and certain other related entities (collectively, the "Debtors") commenced a voluntary case in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") under chapter 11 of title 11 of the United States Code (Case No. 11–14138 (KJC)). On October 10, 2012, the Debtors and GMMM Holdings I, LLC ("GMMM"), entered into a certain Asset Purchase Agreement (the "APA") whereby the Debtors agreed to sell the Greenidge station and certain other assets to GMMM, which intends to salvage and scrap the Greenidge station, such that it will no longer be capable of operating or emitting air pollutants. That APA is conditioned on the termination of the above-referenced Title IV and Title V permits. As such, AES Greenidge LLC requests that DEC promptly terminate the above-referenced permits and provide written confirmation that such permits are no longer in effect.

Should you have any questions or concerns, or require any additional information to complete the termination of the above-referenced permits, please do not hesitate to contact me at your earliest convenience.

Sincerely

Pete Norgeot

President

AES Greenidge LLC

Cc: Adam Strochak, Weil (by e-mail) Stephen Nagle, DEC (by e-mail)



#### IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

STATE OF NEW YORK, and JOE MARTENS,
Commissioner of the Department of Environmental
Conservation of the State of New York,

Plaintiffs,

No. 05 CV 6014 CJS(P)

V.

New York State Electric & Gas Corporation,
AEE 2, L.L.C., AES Greenidge, L.L.C.,
AES Westover, L.L.C., AES Hickling, L.L.C.,
Defendants.

#### STIPULATION AND ORDER TO TERMINATE CONSENT DECREE

WHEREAS, Plaintiffs, the State of New York and Erin M. Crotty, then-Commissioner of the Department of Environmental Conservation of the State of New York (collectively, the "State"), filed a Complaint in this Court on January 12, 2005, against the New York State Electric & Gas Corporation ("NYSEG") and AEE 2, L.L.C., AES Greenidge, L.L.C., AES Westover, L.L.C., AES Hickling, L.L.C. and AES Jennison, L.L.C. (collectively the "AES Entities" and together with NYSEG, the "Defendants" ), pursuant to Clean Air Act, 42 U.S.C. § 7400 et seq. (including 7604(a)), section 71-2103 and 71-2107 of the New York State Environmental Conservation Law and New York State Executive Law § 63(12), for penalties and injunctive relief for alleged violations of, among other things, the Clean Air Act, related state law provisions implementing the Clean Air Act, and the common law of public nuisance regarding emissions from four coal-fired electric generating plants acquired from NYSEG and currently owned by the AES Entities: the Greenidge plant located in Desden, NY; the Westover plant, located in Johnson, City, NY; the Hickling plant located in Corning, NY, and the Jennison plant located in Bainbridge, NY (collectively, the "Plants"); and

<sup>1</sup> Together, the State and the Defendants are referred to as the "Parties."

WHEREAS, the Parties entered into a consent decree, approved by this Court on March 29, 2005 (the "Consent Decree" attached hereto as Exhibit A), to address the allegations set forth in the Complaint, which Consent Decree required the Defendants to, among other things, pay a civil penalty to the state, conduct certain environmental mitigation projects, and take steps to control and reduce emissions from the Plants; and

WHERAS, Paragraph 80 of the Consent Decree provides that the Consent Decree is subject to termination upon motion by the Parties after the Defendants satisfy the material requirements of the Consent Decree; and

WHEREAS, the Defendants have satisfied substantially all requirements of the Consent Decree and the Defendants have been, and remain, in substantial compliance with the terms of the Consent Decree; <sup>2</sup> and

WHEREAS, the Plants are no longer operating and have been permanently retired; and WHEREAS, on December 30, 2011, the AES Entities and certain other related entities (collectively, the "Debtors") commenced a voluntary case in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") under chapter 11 of title 11 of the United States Code (Case No. 11–14138 (KJC));<sup>3</sup> and

WHEREAS, on October 10, 2012, the Debtors and GMMM Holdings I, LLC ("GMMM"), entered into a certain Asset Purchase Agreement (the "APA") whereby the Debtors agreed to sell the Plants and certain other assets to GMMM, which intends to salvage and scrap the Plants, such that the Plants will no longer be capable of operating or emitting air pollutants; and

WHEREAS, on October 11, 2012, the Bankruptcy Court approved a motion authorizing the Debtors' sale of the Plants and other assets free and clear of all liens, claims, encumbrances and other interests to GMMM; and

<sup>&</sup>lt;sup>2</sup> Debtors did not complete their testing for Westover #8 prior to the Unit being shut down, but such testing is now moot due to the Debtors surrender of its Title V permit for this facility contemporaneously with this transaction.

<sup>&</sup>lt;sup>3</sup> The following entities are debtors in the chapter 11 proceedings: AES New York Surety, L.L.C.; AES New York Holdings, L.L.C.; AES NY, L.L.C.; AES NY2, L.L.C.; AES NY3, L.L.C.; AES Creative Resources, L.P.; AES Jennison, L.L.C.; AES Hickling, L.L.C.; AES Eastern Energy, L.P.; AES Somerset, L.L.C.; AES Cayuga, L.L.C.; AEE2, L.L.C.; AES Greenidge, L.L.C.; and AES Westover, L.L.C..

WHEREAS, the AES Entities and GMMM are working to close the sale transaction as soon as possible; and

WHEREAS, the APA is conditioned on termination of the Consent Decree prior to the closing of the sale.

NOW, THEREFORE, in order to facilitate prompt closing of the sale of the Plants to GMMM, it is hereby stipulated and agreed among the Parties, as follows:

- 1. The Defendants have satisfied substantially all requirements of the Consent Decree to the satisfaction of the State.
- 2. Pursuant to Paragraph 80 of the Consent Decree, the Consent Decree is hereby terminated upon approval by the Court, and the surrender of the Title V permits on the facilities.
- This Stipulation contains the entire agreement between the Parties as to the subject matter hereof and supersedes all prior agreements and undertakings between the Parties relating thereto.
- 4. Each of the Parties shall bear all of its own costs and expenses, including, without limitation, legal fees incurred in connection with this Stipulation.
- 5. This Stipulation is valid, shall be binding on the Parties upon its execution, and shall inure to the benefit of the Parties hereto and their respective successors, parents, assigns, affiliates, subsidiaries, agents, executors and legal representatives, and any successor trustee(s) or statutory committee appointed in the Debtors' bankruptcy case.
- 6. The Parties represent and warrant to each other that the signatories to this Stipulation have full power and authority to enter into this Stipulation.
- 7. This Stipulation may not be changed, modified, or amended except in a writing signed by the Parties and/or their counsel.
- 8. This Stipulation may be executed in any number of counterparts and shall constitute one agreement, binding upon the Parties hereto as if the Parties signed the same document; all facsimile signatures shall be treated as originals for all purposes.

Dated: December \_\_\_, 2012

[SIGNATURE PAGE FOLLOWS]

FOR THE STATE

Stephen M. Nagle

Assistant Attorney General

Engironmental Protection Bureau

Michael J. Myers

Chief, Affirmative Litigation Section Environmental Protection Bureau

FOR THE AES ENTITIES

Pete Norgeot

President, AES Greenidge, L.L.C.

President, AES Westover, L.L.C.

President, AES Hickling, L.L.C.

President, AES Jennison, L.L.C.

FOR NYSEG

Mark S. Lyncu

President

IT IS SO ORDERED.

Dated:

Honorable Charles J. Siragusa U.S. District Judge

A

#### FOR THE STATE

Stephen M. Nagle Assistant Attorney General Environmental Protection Bureau

Michael J. Myers Chief, Affirmative Litigation Section Environmental Protection Bureau

FOR THE AES ENTITIES

Pete Norgeot

President, AES Greenidge, L.L.C. President, AES Westover, L.L.C. President, AES Hickling, L.L.C. President, AES Jennison, L.L.C.

FOR NYSEG

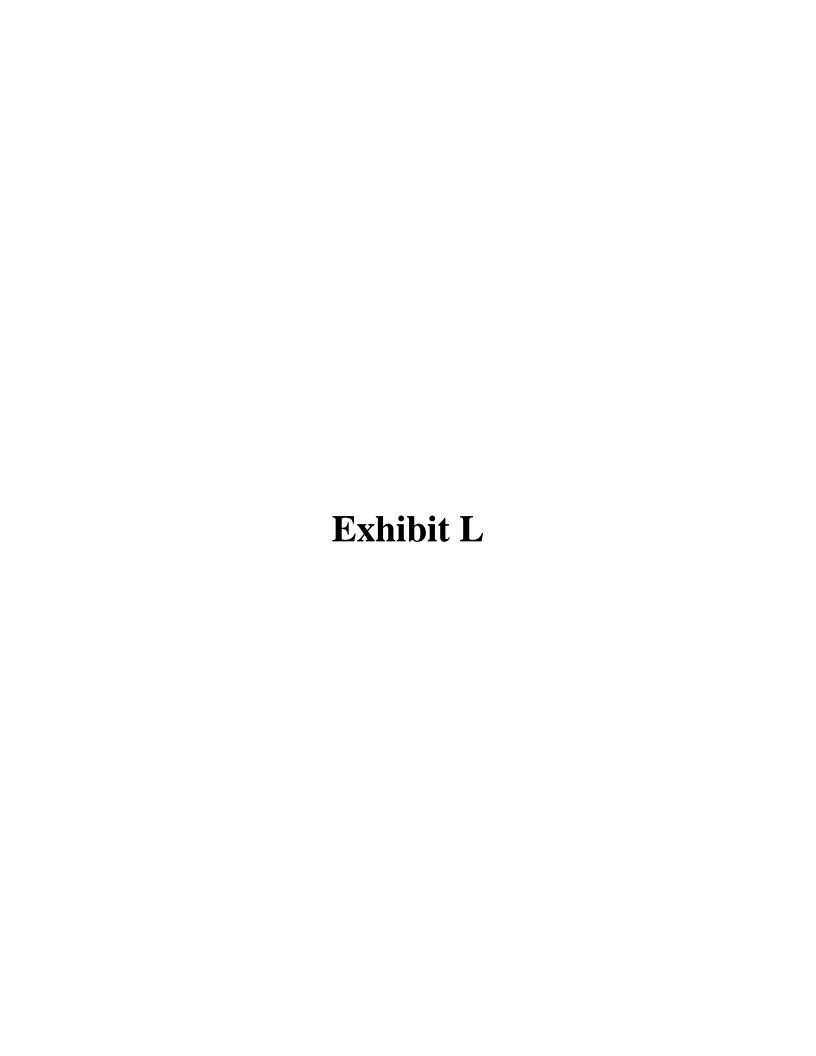
IT IS SO ORDERED.

12-18-12

Dated:

Honorable Charles J. Siragusa

U.S. District Judge



Case: lite Search

## Re; Greenidge Station

From: "David R. Pierce" <dpierce@lindabury.com>
To: Anthony Frassetti'vincent alison', Scott Sheeley

**Date:** 2013/01/24 12:46

**Subject:** Re; Greenidge Station Attachments: img-124124719-0001.pdf

Good morning Scott. GMMM Greenidge, LLC has been discussing the potential reopening of this facility with numerous DEC and local officials. Attached is a letter seeking to have the surrender/termination of the Title Iv and V air permits rescinded so that we can have all options open as we investigate the feasibility of reopening the facility.

Please contact me after you have had an opportunity to review this so that we can discuss how we can best proceed.

Thank you, David

David R. Pierce, Esq.
Lindabury, McCormick, Estabrook &Cooper, P.C.
53 Cardinal Drive
P.O. Box 2369
Westfield, NJ 07091-2369
Ph. (908) 233-6800
Fax (908) 233-5078

e-mail: dpierce@lindabury.com

Westfield, NJ/Summit, NJ/Rumson, NJ/New York, NY/Philadelphia, PA

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#### Case: lite Search

IRS Circular 230 Disclosure: We are required by the Internal Revenue Service to advise you that any tax advice contained in this communication (including any attachment) is not intended to be used, and cannot be used, for the purpose of (1) avoiding penalties under the Internal Revenue Code or (2) promoting, marketing, or recommending any transaction or matter addressed herein.

# Mail Attachment img-124124719-0001.pdf



dpierce@lindabury.com

January 24, 2013

(Via Email and Federal Express)
Mr. Scott E. Sheeley
New York Department of Environmental Conservation
Division of Environmental Permits, Region 8
6274 East Avon-Lima Road
Avon, NY 14414-9516

Re: Permit Reinstatement

Title V- DEC ID 8-5736-00004/00013
Title IV- DEC ID 8-5736-00004/00014
AES Eastern Energy, LP – AES Greenidge, LLC to GMMM Greenidge, LLC
Town of Torrey, Yates County

Dear Mr. Sheeley:

As you may recall, this Firm represents GMMM Greenidge, LLC in connection with its acquisition of the Greenidge power generating facility in the Town of Torrey, Yates County, New York from AES Greenidge, LLC. The approval of the transfer of the SPEDS Permit for Greenidge Station, SPDES Permit #NY-0001325, from AES Greenidge, LLC to GMMM Greenidge, LLC was previously approved by the Department as evidenced by your letter of January 15, 2013 to the undersigned.

In connection with this transfer, it was contemplated that the Greenidge facility was being purchased for scrap and salvage only; there was no thought of reopening that facility for operation. Accordingly, AES Greenidge, LLC submitted correspondence dated November 28, 2012 surrendering, or relinquishing, the following air permits:

- 1) Title V-DEC ID 8-5736-00004/00013; and
- 2) Title IV –DEC ID 8-5736-00004/00014.

The Department accepted the surrender of these permits by letter dated December 19, 2012 addressed to Peter Norgeot, President of AES Greenidge, LLC. A copy of this letter is enclosed for your reference.

Subsequent to the acquisition of the Greenidge facility by GMMM Greenidge, LLC, we have discovered that there is substantial interest in reopening that facility to generate power using a combination of coal and other supplemental fuel sources. My client has engaged in numerous discussions with DEC personnel regarding this possibility and everyone involved, including local officials, is supportive of this proposal as it would retain much needed job opportunities in, and provide tax revenue for, the local area.

As a result, we are requesting that the Department rescind the surrender/termination of the Title IV and Title V Air Permits listed above and approve the transfer of those permits to GMMM Greenidge, LLC. This will give GMMM Greenidge LLC a meaningful opportunity to attempt to return this facility to productive use.

Please advise if the Department requires any further information, including, but not limited to a formal Permit Transfer Application, and I will do my best to provide that information to you. Should you have any questions regarding this matter, please do not hesitate to contact me.

Very truly yours,

LINDABURY, Mc@ORMICK, ESTABROOK & COOPER, P.C

David R. Pierce

DRP:pdp Enclosure

c:

- B. Constantakes, Office of General Counsel, DEC Albany
  - L. Bracci, Regional Attorney, DEC Region 8
  - T. Marriott/D. Walsh, Division of Air Resources, DEC Region 8
  - C. Hogan, Division of Environmental Permits, DEC Albany
  - S. Riva, Chief USEPA Region 2 Permitting Section, Air Programs Branch

DEC - Fee Billing Unit

Anthony Frassetti, GMMM Greenidge, LLC

Vinnie Allison

## New York State Department of Environmental Conservation

**Environmental Permits, Region 8** 

6274 East Avon-Lima Rd, Avon NY 14414-9516 Phone: (585) 226-5400 • Fax: (585) 226-2830

Website: www.dec.ny.gov



December 19, 2012

Peter Norgeot, President AES Greenidge LLC AES Eastern Energy 130 East Seneca Street, Suite 505 Ithaca, New York 14850

Regarding:

Permit Relinquishment

Title V - DEC ID 8-5736-00004/00013 Title IV - DEC ID 8-5736-00004/00014

AES Eastern Energy LP - AES Greenidge LLC

Town of Torrey, Yates County

Dear Mr. Norgeot:

The New York State Department of Environmental Conservation (DEC) has received your letter dated November 28, 2012 regarding the permanent shutdown and pending demolition of the AES Greenidge Station in the Town of Torrey, Yates County.

Your submission has satisfied the requirements listed in 6 NYCRR Part 621 [Section 621.11(d)] for permit relinquishments. Therefore, in accordance with 6 NYCRR Section 621.11(e), this letter constitutes written verification of the Department's concurrence with relinquishment of the above-referenced permits. We have also withdrawn the active application to renew and modify the Title V and Title IV Permits received May 4, 2012, and have discontinued the previously SAPA-extended Title IV and Title V Permits.

The Title IV and Title V Permits referenced above are no longer in effect.

Please contact me at this office at (585) 226-5382 if you have any questions regarding this letter.

Sincerely,

Jeott E. Sheeley

Regional Permit Administrator

Cc:

- B. Constantakes, Office of General Counsel, DEC Albany (w/incoming)
- L. Bracci, Regional Attorney, DEC Region 8 (w/incoming)
- T. Marriott/D. Walsh, Division of Air Resources, DEC Region 8 (w/incoming)
- C. Hogan, Division of Environmental Permits, DEC Albany (w/incoming)
- S. Riva, Chief USEPA Region 2 Permitting Section, Air Programs Branch (w/incoming) DEC Fee Billing Unit (letter only)



### New York State Department of Environmental Conservation

Division of Environmental Permits, Region 8 6274 E. Avon-Lima Road, Avon, New York 14414-9519

Phone: (585) 226-5400 • Fax: (585) 226-2380

Website: www.dec.ny.gov



January 30, 2013

Via E-mail (dpierce@lindabury.com) and U.S. Mail

David R. Pierce, Esq. Lindabury, McCormick, Estabrook & Cooper, P.C. 53 Cardinal Drive P.O. Box 2369 Westfield, New Jersey 07091-6800

Re:

Request for Rescission of Permit Surrender Title V – DEC ID No. 8-5736-00004/00013 Title IV – DEC ID No. 8-5736-00004/00014

Greenidge Station, Town of Dresden, Yates County

Dear Mr. Pierce:

This replies to your January 24, 2013 letter to the Department, sent to my attention, requesting that the Department rescind the surrender of the above-referenced Title IV and Title V permits.

Please be advised that there is no provision in the Department's laws or regulations to rescind the surrender of the above-referenced permits. The AES Greenidge Title IV and Title V permits for the Greenidge Station facility were duly surrendered by AES Greenidge, LLC and, upon acceptance by the Department in its December 19, 2012 letter (which you attached to your letter), became null and void. Further, based on the documentation available to the Department, the facility has been sold by AES Greenidge, LLC to a new owner, GMMM Greenidge, LLC, which you represent. If any entity wishes to operate the air emissions sources at the Greenidge Station facility, they will need to file new Title IV and Title V permit applications with the Department.

Thank you for your consideration.

Tion E. Sheele

Sincerely,

Scott E. Sheeley

Regional Permit Administrator

cc: Leo Bracci, Regional Attorney, NYSDEC Region 8

William Little, Office of General Counsel, NYSDEC Albany

Blaise Constantakes, Office of General Counsel, NYSDEC Albany

Thomas Marriott, Regional Air Pollution Control Engineer, NYSDEC Region 8

Christopher Hogan, Division of Environmental Permits, NYSDEC Albany